United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 1905.

No. 1544. **356**

THE SUPREME COMMANDERY OF THE UNITED ORDER OF THE GOLDEN CROSS OF THE WORLD, A CORPORATION, APPELLANT,

vs.

RICHARD BERNARD AND ALFRED D. BERNARD, EXECUTORS AND ASSIGNEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED APRIL 24, 1905.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

APRIL TERM, 1905.

No. 1544.

THE SUPREME COMMANDERY OF THE UNITED ORDER OF THE GOLDEN CROSS OF THE WORLD, A CORPORATION, APPELLANT,

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RICHARD BERNARD AND ALFRED D. BERNARD, EXECUTORS AND ASSIGNEES.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 25, 1905.

In the Court of Appeals of the District of Columbia.

THE SUPREME COMMANDERY OF THE UNITED ORDER OF the Golden Cross of the World, a Corporation, Appellant,
vs.
RICHARD BERNARD and ALFRED D. BERNARD, Executors and Assignees.
} No. 1544.

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a Supreme Court of the District of Columbia.

RICHARD BERNARD and ALFRED D. BERNARD, Executors and Assignees, Plaintiffs,
vs.
THE SUPREME COMMANDERY OF THE UNITED Order of the Golden Cross of the World, a Corporation, Defendant.
} No. 46254. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Amended Declaration, etc.*

Filed Jan. 18, 1904.

In the Supreme Court of the District of Columbia.

RICHARD BERNARD and ALFRED D. BERNARD, Executors and Assignees, Plaintiffs,
vs.
THE SUPREME COMMANDERY OF THE UNITED Order of the Golden Cross of the World, a Corporation, Defendant.
} No. 46254. At Law.

Richard Bernard, and Alfred D. Bernard, executors under the last will and testament of Joseph Trainor, late of Baltimore county,

State of Maryland, deceased, and assignees of Alfred D. Bernard, executor under the last will and testament of Katherine W. Trainor deceased, and assignees of J. Marion Duncan and Fannie Bernard, sole heirs at law and next of kin of said Katherine W. Trainor deceased, by Wm. F. Hall, I. Q. H. Alward and Richard Bernard & Son, their attorneys, sue The Supreme Commandery of the United Order of the Golden Cross of the World, a corporation, defendant.

(1.) For that the plaintiffs are the executors of the last will and testament of Joseph Trainor, deceased, who departed this life on December 2nd. 1902, and are also the assignees of Alfred D. Bernard, executors under the last will and testament of Katherine W. Trainor, deceased, who departed this life on or about November 8th., 1900, and are also assignees of J. Marion Duncan and Fannie Bernard, sole heirs at law and next of kin of said Katherine
2 W. Trainor, deceased; and the defendant was and is a corporation existing under the laws of the State of Tennessee, and having an office in the District of Columbia, and authorized by its charter to issue benefit certificates to its members, payable at the death of the member as he or she may have directed while living, and as contained in the benefit certificate. And for that the said Joseph Trainor, being a member of said defendant, and having complied with all the prerequisites of the constitution and by laws of the defendant, it the defendant did, on the 22nd. day of January in the year eighteen hundred and ninety, at its principal office in Knoxville, Tennessee, issue to the said Joseph Trainor a benefit certificate in the words and figures following, to wit:

United Order of the Golden Cross of the World.

No. 22899, Junior Class. Full Rate, $2,000.

Benefit Certificate.

This certificate is issued to Joseph Trainor, a member of Halcyon Commandery No. 126, United Order of the Golden Cross, located at Washington, D. C. upon evidence received from said commandery that he is a contributor to the junior class benefit fund of this order, and upon condition that the statements made by him in this application for membership in said commandery and the statements certified by him to the medical examiner, both of which are filed in the office of the supreme keeper of records, be made a part of this contract; and upon condition that the said member complies in the future with the laws, rules and regulations now governing said commandery and fund, or that may hereafter be enacted by the
3 supreme commandery to govern said commandery and fund.

These conditions being complied with, the Supreme Commandery United Order of the Golden Cross of the World hereby prom-

ises and binds itself to pay out of its junior class benefit fund to Catherine W. Trainor, wife, in accordance with and under the provisions of the law governing said benefit fund, and upon satisfactory evidence of the death of said member, and upon the surrender of this certificate, the sum of two thousand dollars; Provided the said benefit fund of said class reaches the sum of two thousand dollars at the assessment called in payment of this certificate; and if said assesment shall not reach the said sum of two thousand dollars, there shall be paid on said certificate, all or a proportional part of the fund received from the membership in one assessment; and further provided that said member is in good standing in this order at the time of his death that this certificate shall not have been surrendered by said member and another certificate issued at his request, in accordance with the laws of the order. And provided also that the suspension, disconnection or expulsion of said member shall work an immediate forfeiture of all claims of said member on the benefit fund of this order, and also the forfeiture of the claims of the beneficiaries named in this certificate.

Signed, sealed, tested and delivered January 22nd, 1890.

(The original policy will be hereafter filed.)

And for that, the purpose of the defendant, as set forth in its charter of incorporation among others, was to "establish a benefit fund from which a sum not to exceed $2,000 shall be paid at the death of each member to his or her family, or to be disposed of as he or she may direct."

4

And for that, under the constitution and by laws of said defendant, (of which the plaintiffs have no copy and therefore cannot file same, but ask that the defendant file a copy) the said Joseph Trainor was required to pay a certain monthly assessment, which said assessment was regularly paid to the Halcyon Commandery, a subordinate commandery of the defendant, up to the assessment levied as of November 1st, 1902, and payable within thirty days thereafter, at and after which time the said Joseph Trainor stood technically disconnected from said defendant under its constitution and by laws; but the said Joseph Trainor, had he lived, would have been entitled, upon payment of said assessment at any time during the month of December, 1902, to become reinstated in said defendant; that the clause of the constitution and by laws of the defendant had been construed by it to give each member of the defendant an additional thirty days within which to pay each and every assessment levied by the defendant. That no member was even reported disconnected until after the third Thursday of the month following the month in which the assessment became due; that over sixty per cent. of the members of Halcyon Commandery were technically disconnected each and every month; so that the officers of the defendant had, and always regarded the clause of the constitution and by laws as giving to the member an additional thirty days in which to pay his assessment. That before the said Joseph Trainor was reported disconnected, he was known

5

to have been dead by the defendant. And these plaintiffs say, that before the expiration of said thirty days, and within the time in which the said Joseph Trainor would have had the right to have paid said assessment, the same was tendered to the Halcyon Commandery, and acceptance of the same refused. And these plaintiffs further say the assessment levied as of December 1st. 1902, and payable within thirty days thereafter was also tendered to said Halcyon Commandery and acceptance of the same refused. And these plaintiffs further say, that by reason of the payment and tender of all the assessments due and levied against the said Joseph Trainor up to and inclusive of the month of December, 1902, in which month he died; he the said Joseph Trainor was, and continued to be a member in good standing of the defendant in the city of Washington, and well and truly paid or there was tendered for his account, all the assessments of the said defendant within the time required by its constitution and by laws; and that the said Joseph Trainor did in all other respects well and truly comply with the constitution and by laws of the defendant.

And for that the said Katherine W. Trainor, the beneficiary named in said certificate, departed this life in the month of November, 1900, leaving a last will, wherein she constituted and appointed Alfred D. Bernard the executor. That soon thereafter, the said Joseph
6 Trainor applied to the defendant to change the beneficiary to the executor named in his last will and testament, naming his then contemplated executor; which change the defendant refused to make, and thereupon through its subordinate officer, W. S. Stetson Esq. keeper of records of Halcyon Commandery No. 128 a local commandery of the defendant told the said Joseph Trainor that the beneficiary must be a dependent member of his own family; whereupon the said Joseph Trainor being ignorant of the fact that the defendant had no office in the State of Maryland, wherein the said Joseph Trainor was a resident, was advised that if he failed to designate a beneficiary to take said fund, on his death the fund would become the property of the personal representatives of his said wife, the said Katherine W. Trainor, and being so advised, he entered into an agreement with the said J. Marion Duncan and Fannie Bernard, the sole personal representatives of said Katherine W. Trainor, in the words and figures following.

"Whereas, benefit certificate No. 22899, junior class full rate for $2,000. United Order of the Golden Cross of the World, now in force, appears to be so drawn that in the event of the death of said Joseph Trainor, the said sum of $2,000, would be paid to the next of kin of his late wife, Katherine Trainor, deceased, to whom said sum was made payable in said certificate.

Now this agreement witnesseth that in consideration of the said Joseph Trainor keeping in force said benefit certificate, the undersigned, they being the next of kin of said Katherine Trainor, deceased, hereby agree to pay over said sum to the executors or ad-

ministrators of said Joseph Trainor, whatever sum of money
7 they may receive under said certificate.

Signed, and dated February 22, 1902.

(The original will be hereafter filed.)

That the said Joseph Trainor after entering into said agreement made and executed a private letter of instructions to his said executors in the words and figures following:

Letter of Instructions to My Executors.

WASHINGTON, D. C., *March* 15, 1902.

To Richard Bernard and Alfred D. Bernard, executors of my last will and testament. In accordance with the terms of the contract signed by J. Marion Duncan and Frances D. Bernard the lawful heirs of my late wife Catherine W. Trainor, that I should have the power of disposal as I should choose by letter of the proceeds of my life insurance in the United Order of the Golden Cross, the amount of which is $2,000. and of which my said wife was the named beneficiary, I hereby desire to instruct you that I wish the proceeds of said policy of life insurance in the said association shall be dispensed by you as follows at my death.

1. That $500 of said sum of $2000. shall — used for the education of Richard Rowland Duncan son of J. Marion Duncan of Baltimore county, Maryland, in some profession, law, medicine or divinity or in a business college to thoroughly prepare him for business after he shall have obtained a common school education; but if such business or professional education is impossible by reason of some physical or mental impediment or im-ediments, then at the
8 age of twenty-one years he shall come into the full possession of said $500. (if I be deceased at that time) or prior to his becoming twenty-one years of age if the money be available; the interest or income thereof shall be applied in assisting his education, such as he is able to receive, or in clothing him or otherwise for his benefit. If the said Richard R. Duncan die before the $500. referred to has been utilized in the way described above, it shall be turned into my estate to be disposed of as per my last will and testament.

2. That $250. shall be paid to Julia E. Duncan wife of said J. Marion Duncan, or if she die before receiving the said amount derived from said policy, it also shall be turned into the body of my estate to be disposed of in same manner.

3. That $100. shall be paid to Thomas Allender if alive and his whereabouts known, provided however he has sustained an upright character, is sober and steady and worthy of such consideration as having this $100 worthily and beneficially bestowed upon him, these facts to be determined by the executors of my last will and testament named above, without law but in their judgment.

4. $125 to Frances D. Bernard wife of Richard Bernard, and Richard Constable Bernard, son of Alfred D. Bernard, each, and in

case of the death of either or both, the same belonging to either or each dying, to revert to my estate, and the same with all other bequests under this letter in case of the person or persons dying for whom said gifts were intended.

9 5. To Mrs. Eliza J. Young, wife of Dr. —— Young, an amount sufficient to complete the payments for the house now owned by her in Baltimore city, not to exceed $175. In case the house is paid for at the time of my death, the sum of $125 shall in lieu of this $175, be paid to her mother Mrs. Mary P. Brannon.

6. The remainder of the money derived from my life insurance policy shall be covered into my estate, to be distributed according to my last will and testament, except $100 to be given to Ettie—daughter of Ettie May (*née* Cook) and granddaughter of my sister Marcellah C. Warfield.

JOSEPH TRAINOR.

(The original in the handwriting of Joseph Trainor will be hereafter filed.)

That by reason of said application to the defendant, the agreement with the personal representatives of the said Katherine W. Trainor, and the letter of instructions, the said J. Marion Duncan and Fannie Bernard, for the purpose of turning the same over to the said Richard Bernard and Alfred D. Bernard, executors of Joseph Trainor, became entitled to said fund of two thousand dollars, under the constitution and by laws of the defendant corporation;

That by reason of the assignments, agreements and letter of instructions hereinbefore referred to, the plaintiffs are the only persons entitled to receive said fund.

And they pray that the Exhibits A to G heretofore filed with the amended bill of November 13, 1903, be read and incorporated herein as though filed with this their amended declaration; and that the constitution and by laws of the defendant when filed be marked Exhibit H.

10 And the plaintiffs further say that the defendant has been duly furnished with satisfactory evidence of the death of said Joseph Trainor, within the time and according to the form required by the defendant; and that the sum of two thousand dollars due under said certificate was duly demanded by the plaintiffs; that the time within which the defendant is required to pay said sum has long since elapsed, yet the defendant has refused and still refuses to pay the said sum of two thousand dollars or any part thereof, to the great damage of the plaintiffs who bring this suit and claim as their damages three thousand dollars ($3,000).

WILLIAM F. HALL,
I. Q. H. ALWARD &
RICH. BERNARD & SON,
Attorneys for Plaintiffs,

The defendant is to plead hereto on or before the twentieth day after service hereof, Sundays and legal holidays excepted; otherwise judgment.

I. Q. H. ALWARD,
Attorney for Plaintiff-.

11 EXHIBIT A.

Filed Nov. 24, 1903.

Joseph Trainor Last Will & Testament.

Know that I Joseph Trainor of Baltimore County in the state of Maryland temporarily residing in the City of Washington in the District of Columbia do make and Publish this my last will and testament hereby revoking all former wills by me made and declaring this to be my only last Will and Testament.

First. I order all my just debts and funeral expenses to be paid out of my estate.

Second. I give and bequeath unto the Trustees of the Reisterstown Methodist Episcopal Church the sum of five Hundred dollars the income thereof to be applied to the payment of the salary of the paster of said church. This bequest to be on condition that the said Trustees for themselves and their successors agree to keep the burial lots standing in the name of my mother-in-law the late Julia A. Duncan and the lots standing in my name in the Cemetary connected with said Church in order.

Third. All the rest and residue of my estate of every kind and wherever situat-—including the estate bequeathed and devised by my late wife over which I have the power of disposition by last Will, I give devise and bequeath unto Richard Bernard and Alfred D. Bernard and the survivor of them in Trust and Confidance to hold the same and pay the income of fifteen Hundred dollars thereof to my sister Elizabeth R. Trainor during her natural
12 life.

In Trust and confidence further to pay the income of the remainder of the rest and residue of my *of my* said estate to my other brothers and sisters both of the whole and half blood, viz: Robert M. G. Trainer, Marcellah Warfield, Alice O. Golson, George H. Trainer and Mary Herder share and share alike and to the survivor or survivors of them during their respective lives.

In Trust and confidence further to pay out of the corpus of said sum of fifteen Hundred dollars to the extent of one Hundred dollars the funeral expenses of my said sister Elizabeth.

In Trust and Confidence further to hold the said sum of fifteen Hundred dollars after deducting said sum of one hundred dollars as aforesaid after the death of my said sister Elizabeth and divide the net income thereof, share and share alike among my surviving brothers and sisters of the whole and half blood and the survivor and survivors of them until the death of the last survivor. And

from and after the death of all my said brothers and sisters of the whole and half blood. In trust and confidence to turn over the whole of the corpus of my estate that may remain share and share alike to my nephews and nieces of the whole and half blood and their issue *per stirpes* absolutely.

And Lastly I hereby constitute and appoint the said Richard Bernard and Alfred D. Bernard and the survivor of them to be the executors of this my Last Will and Testament. In testimony of
which I have hereunto set my hand and affixed my seal in
13 the City of Baltimore this 22nd. day of February in the year of our Lord Nineteen Hundred and one.

JOSEPH TRAINOR. [SEAL.]

Signed sealed published and declared by Joseph Trainor the above named testator as and for his last will and testament in the presence of us who in his presence at his request and in the presence of each other have hereunto signed our names as witnesses.

FANNIE BERNARD,
JEANNETTE E. WAKEFIELD,
1718 *St. Paul St., Baltimore, Md.*

BALTIMORE COUNTY, *ss:*

On the 11th day of December 1902, came Alfred D. Bernard and made oath that he does not know of any will or codicil of Joseph Trainor late of said county, deceased, other than the above instrument of writing, and that he received the same from testator on date of its execution on or about the 22nd day of February, 1901. Testator died Dec. 2nd, 1902.

Sworn to before the subscriber.

HARRISON RIDER,
Register of Wills for Baltimore County.

BALTIMORE COUNTY, *ss:*

On the 11th day of December 1902, came Fannie Bernard
14 and Jeannette E. Wakefield, subscribing witnesses to the foregoing last will and testament of Joseph Trainor, late of said county, deceased, and made oath that they did see the testator sign and seal this will, that they heard him publish, pronounce and declare the same to be his last will and testament; that at the time of his so doing he was to the best of their apprehension of sound and disposing mind, memory and understanding, and that they subscribed their names as witnesses to this will in his presence at his request, and in the presence of each other.

Sworn to before the subscriber.

Test:

HARRISON RIDER,
Register of Wills for Baltimore County.

In the Orphans' Court of Baltimore County.

The court, after having carefully examined the above last will and testament of Joseph Trainor, late of Baltimore county, deceased, and also the evidence adduced as to its validity, orders and decrees, this 16th day of December 1902, that the same be admitted in this court as the true and genuine last will and testament of the said Joseph Trainor, deceased.

MELCHOR HOSHALL.
ALBERT F. BRUNIER.
LOUIS W. HELD.

In testimony that the aforegoing is a true copy taken from
15 "original" filed and of record in the office of the register of wills for Baltimore county I hereunto subscribe my name and affix the seal of my office this 27" day of Dec. A. D. 1902.

Test:—

HARRISON RIDER,
[SEAL.] *Register of Wills for Balto. Co.*

MARYLAND, *sct:*

I, Melchor Hoshall, chief judge of the orphans' court of Baltimore county, in the State aforesaid, do certify that the aforegoing attestation of Harrison Rider, register of wills for said county, is in due form and by the proper officer, who is the custodian of the records and papers of the orphans' court of Baltimore county, and is now in office.

Given under my hand, at Towson, this 17th day of November in the year of our Lord one thousand nine hundred & three.

MELCHOR HOSHALL.

STATE OF MARYLAND, *Baltimore County,* } *To wit:*

I, Harrison Rider, register of wills for Baltimore county, do hereby certify, that the Honorable Melchor Hoshall, by whom the above certificate was given, and who hath thereto subscribed his name, was, at time of so doing, chief judge of the orphans' court of
16 Baltimore county, duly elected, commissioned and qualified, and is now in office.

In testimony whereof, I hereunto subscribe my name and
[SEAL.] affix the seal of the said court, this 17th day of November, in the year of our Lord one thousand nine hundred & three.

Test:

HARRISON RIDER,
Register of Wills for Baltimore County.

EXHIBIT B.

THE STATE OF MARYLAND, *Baltimore County,* } *sct:*

The subscriber, register of wills for Baltimore county, doth hereby certify that it appears by the records in his office that letters of administration of all the goods, chattels, credits and personal estate of Joseph Trainor deceased, were on the 16th day of December in the year of our Lord nineteen hundred and two granted and committed unto Richard Bernard and Alfred D. Bernard the executors by the last will and testament of the said deceased appointed.

In testimony whereof, I hereunto subscribe my name and
17 affix the seal of my office the 16th day of December in the year of our Lord nineteen hundred and two.

Test:

[SEAL.] HARRISON RIDER,
Register of Wills for Baltimore County.

MARYLAND, *sct:*

I, Melchor Hoshall, chief judge of the orphans' court of Baltimore county, in the State aforesaid, do certify that the aforegoing attestation of Harrison Rider, register of wills for said county, is in due form and by the proper officer, who is the custodian of the records and papers of the orphans' court of Baltimore county, and is now in office.

Given under my hand, at Towson, this 17th day of November in the year of our Lord one thousand nine hundred & three.

MELCHOR HOSHALL.

STATE OF MARYLAND, *Baltimore County,* } *To wit:*

I, Harrison Rider, register of wills for Baltimore county, do hereby certify, that the Honorable Melchor Hoshall, by whom the above certificate was given, and who hath thereto subscribed his name, was, at the time of so doing, chief judge of the orphans' court of Baltimore county, duly elected, commissioned and qualified, and is now in office.

18 In testimony whereof, I hereunto subscribe my name and affix the seal of the said court, this 17th day of November, in the year of our Lord one thousand nine hundred & three.

Test:

[SEAL.] HARRISON RIDER,
Register of Wills for Baltimore County.

EXHIBIT C.

Katherine W. Trainor
Last Will & Testament

Know that I Katherine W. Trainor of Baltimore County in the State of Maryland, being of sound and disposing mind, memory and understanding, do make and publish this my last Will and Testament, in manner and form following that is to say:

First: I order and direct that all my just debts and funeral expenses be fully paid and satisfied out of my estate.

Second: I give and bequeath unto my brother J. Marion Duncan the portrait of my mother.

Third: I give and bequeath unto my sister in law Julia B. Duncan my sewing machine.

Fourth: Whereas under the terms of my mother's last Will and Testament a legacy of Five hundred dollars was bequeathed to me, which said legacy was made a charge upon the farm near Woodensburgh devised to my brother J. Marion Duncan; which said legacy has not been paid and is still a charge upon said property. I do hereby give and bequeath said legacy unto my brother
19 J. Marion Duncan for and during the term of his natural life, and from and after his death to his children and their descendants; share and share alike *per stirpes,* absolutely. And it is my wish that said legacy be not disturbed but be and remain a charge upon said estate so as aforesaid devised to my brother.

Fifth. All the rest and residue of my estate of whatever kind and wherever situate, I give devise and bequeath unto Alfred D. Bernard, in trust and confidence nevertheless and to and upon the following uses and trusts, namely.

(*a.*) To collect the rents, issues and profits thereof and to pay the net income of seven tenths of said rest and residue to my husband Joseph Trainor, for and during the term of his natural life and no longer and in trust to pay the net income of the remaining three tenths of said rest and residue to my brother J. Marion Duncan, during the term of his natural life and no longer.

(*b.*) In further trust and confidence after the death of said Joseph Trainor to pay one half of the corpus of said rest and residue to such person or persons as my husband the said Joseph Trainor may by last will and testament appoint and in such amounts and on such terms as the said Joseph Trainor may direct in said last will.

(*c.*) After the death of my husband the said Joseph Trainor; in further trust to pay over to my brother J. Marion Duncan the net income of one half of the rest and residue of my estate for and during the term of his natural life, and after his death to his child or children and their descendants *per stirpes* absolutely; subject
20 to the following bequests which are made a charge upon the one half of the rest and residue bequeathed to my brother J. Marion Duncan, and are to be paid as soon as may be convenient

after the death of my husband, the said Joseph Trainor; to wit, to my cousin Eliza J. Brannan Young the sum of one hundred and twenty five dollars clear of collateral inheritance tax; second to my grandnephew Richard Constable Bernard the sum of one hundred and twenty five dollars, clear of collateral inheritance tax.

(*d.*) In the event of my husband the said Joseph Trainor making no disposition of said one half of the rest and residue of my estate by last will; in trust to pay the net income of said one half of the rest and residue of my estate to my brother the said J. Marion Duncan during the term of his natural life and after his death to his child or children and their descendants *per stirpes* absolutely.

(*e.*) In the event of the said Eliza J. Brannan Young or the said Richard Constable Bernard dying before my husband the said Joseph Trainor, without issue, I order and direct that the legacy so bequeathed to them shall become a portion of the said one half of the rest and residue of my estate bequeathed as aforesaid to my brother J. Marion Duncan for life with remainder as above set forth.

(*f.*) In the event of the said J. Marion Duncan departing this life, leaving no child or descendants of children living at the time of his death; then I give devise and bequeath the portion of the estate he or his child or children or descendants would be entitled to
21 receive to his wife if living for and during the term of her natural life; and from and after her death; to my sister Francis Bernard and her descendants *per stirpes* absolutely.

In order that my estate in trust may yield the highest revenue consistent with safety, I order and empower the said Alfred D. Bernard trustee to sell the whole or any part of said rest and residue, and reinvest the proceeds in some safe securities subject to the approval of a court of competent jurisdiction; the purchaser at any such sale not being bound to see to the application of the purchase money.

Lastly: I hereby constitute and appoint Alfred D. Bernard the executor of this my last will and testament hereby revoking all former wills by me made and declaring this to be my only last will and testament.

Done in Baltimore county this twenty sixth day of May, A. D. nineteen hundred.

KATHERINE W. TRAINOR. [SEAL.]

Signed; sealed, published and declared by Katherine W. Trainor the above named testatrix, as and for her last will and testament in the presence of us, who, in her presence, at her request, and in the presence of each other, have hereunto subscribed our names as witnesses.

ANNIE M. MEREDITH.
WM. J. ALLMAN,
Woodensburg, Md.

BALTIMORE COUNTY, *ss:*

On the 13th day of November 1900, came Alfred D. Ber-
22 nard and made oath that he does not know of any will or codicil of Katherine W. Trainor late of said county, deceased, other than the above instrument of writing, and that he received the same from testatrix on date of its execution on or about the 26th day of May 1900.

Sworn to in open court

Test:

HARRISON RIDER,
Register of Wills for Baltimore County.

BALTIMORE COUNTY, *ss:*

On the 13th day of November 1900, came Annie M. Meredith and Wm. J. Allman, subscribing witnesses to the foregoing last will and testament of Katherine W. Trainor, late of said county, deceased, and made oath they did see the testatrix sign and seal this will, that they heard her publish, pronounce and declare the same to be her last will and testament; that at the time of her so doing she was to the best of their apprehension of sound and disposing mind, memory and understanding, and that they subscribed their names as witness- to this will in her presence at her request, and in the presence of each other.

Sworn to in open court.

Test:

HARRISON RIDER,
Register of Wills for Baltimore County.

23 In the Orphans' Court of Baltimore County.

The court, after having carefully examined the above last will and testament of Katherine W. Trainor, late of Baltimore county, deceased, and also the evidence adduced as to its validity, orders and decrees, this 13th day of November, 1900, that the same be admitted in this court, as the true and genuine last will and testament of the said Katherine W. Trainor, deceased.

MELCHOR HOSHALL.
ALBERT F. BRUNIER.
LOUIS W. HELD.

In testimony that the aforegoing is a true copy taken from "original" filed and of record in the office of the register of wills for Baltimore county I hereunto subscribe my name and affix the seal of my office this 16th day of November A. D. 1900.

Test:

[SEAL.]

HARRISON RIDER,
Register of Wills for Baltimore County.

MARYLAND, *sct:*

I, Melchor Hoshall, chief judge of the orphans' court of Baltimore county, in the State aforesaid, do certify that the aforegoing attestation of Harrison Rider, register of wills for said county, is in due form and by the proper officer, who is the custodian of the records and papers of the orphans court of Baltimore county,
24 and is now in office.

Given under my hand, at Towson, this 17th day of November in the year of our Lord one thousand nine hundred & three.

MELCHOR HOSHALL.

STATE OF MARYLAND, *Baltimore County,* } *To wit:*

I, Harrison Rider, register of wills for Baltimore county, do hereby certify, that the Honorable Melchor Hoshall, by whom the above certificate was given, and who hath thereto subscribed his name, was, at the time of so doing, chief judge of the orphans' court of Baltimore county, duly elected, commissioned and qualified, and is now in office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said court, this 17th day of November, in the year of our Lord one thousand nine hundred & three.

Test:

[SEAL.] HARRISON RIDER,
Register of Wills for Baltimore County.

EXHIBIT D.

MARYLAND, *ss:*

The State of Maryland to all persons to whom these presents shall come, Greeting:

Know ye, that the last will and testament of Katherine W.
25 Trainor late of Baltimore county, deceased, hath been in due form of law exhibited, proved and recorded in the office of the register of wills for Baltimore county, a copy of which is to these presents annexed, and administration of all the goods, chattels and credits of the said deceased is hereby granted and committed unto Alfred D. Bernard the executor by the said will appointed.

Witness, Melchor Hoshall chief justice of the orphans'
[SEAL.] court of Baltimore county, this 13th day of November in the year nineteen hundred.

Test: HARRISON RIDER,
Register of Wills for Baltimore County.

MARYLAND, *sct:*

I, Melchor Hoshall, chief judge of the orphans' court of Baltimore county, in the State aforesaid, do certify that the aforegoing attesta-

tion of Harrison Rider, register of wills for said county, is in due form and by the proper officer who is the custodian of the records and papers of the orphans' court of Baltimore county, and is now in office.

Given under my hand, at Towson, this 17th day of November in the year of our Lord one thousand nine hundred & three.

MELCHOR HOSHALL.

STATE OF MARYLAND, *Baltimore County,* } *To wit:*

I, Harrison Rider, register of wills for Baltimore county, do
26 hereby certify, that the Honorable Melchor Hoshall, by whom the above certificate was given, and who hath thereto subscribed his name, was, at the time of so doing, chief judge of the orphans' court of Baltimore county, duly elected, commissioned and qualified, and is now in office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said court, this 17th day of November, in the year of our Lord one thousand nine hundred & three.

Test:

[SEAL.] HARRISON RIDER,
Register of Wills for Baltimore County.

EXHIBIT E.

THE STATE OF MARYLAND:

At an orphans' court held for Baltimore county, in the court house, in Towsontown, on the 26th day of May in the year of our Lord one thousand nine hundred and three.

Present: Melchor Hoshall, Albert F. Brunier, Louis W. Held, judges; Wm. J. Oeligrath, sheriff; Harrison Rider, register of wills.

Among other proceedings were the following, viz:

In the Matter of the Estate of CATHERINE W. TRAINOR. (Upon Petition.)

27 Upon the foregoing petition and affidavit, it is ordered by the orphans' court of Baltimore county this 26th. day of May, 1903, that Alfred D. Bernard, executor of Katherine W. Trainor, be and he is hereby authorized with the consent of J. Marion Duncan and Fannie Bernard, sole heirs at law and next of kin of Katherine W. Trainor, to assign any right, title and interest he may have in a certain benefit certificate in the United Order of the Golden Cross, to Richard Bernard and Alfred D. Bernard executors under the will of Joseph Trainor, for the purposes of bringing suit on the said certificate, and it is further ordered that if it should appear or be finally determined that the said Alfred D. Bernard executor is en-

titled to said fund for the purposes of distribution in this court, that the same will be distributed by him according to the terms of a future order to be passed in the premises.

ALBERT F. BRUNIER,
LOUIS W. HELD, *Judges.*

In testimony that the aforegoing is a true copy of the original order, filed and of record among the proceedings of the orphans' court of Baltimore county, I hereunto subscribe my name, and affix the seal of the said court, this 26th day of May in the year of our Lord nineteen hundred and three.

Test:

[SEAL.] HARRISON RIDER,
Register of Wills for Baltimore County.

28 MARYLAND, *sct:*

I, Melchor Hoshall, chief judge of the orphans' court of Baltimore county, in the State aforesaid, do certify that the aforegoing attestation of Harrison Rider, register of wills for said county, is in due form and by the proper officer, who is the custodian of the records and papers of the orphans' court of Baltimore county, and is now in office.

Given under my hand, at Towson, this 17th day of November in the year of our Lord one thousand nine hundred & three.

MELCHOR HOSHALL.

STATE OF MARYLAND, } *To wit:*
Baltimore County, }

I, Harrison Rider, register of wills for Baltimore county, do hereby certify, that the Honorable Melchor Hoshall, by whom the above certificate was given, and who hath thereto subscribed his name, was, at the time of so doing, chief judge of the orphans' court of Baltimore county, duly elected, commissioned and qualified, and is now in office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said court, this 17th day of November, in the year of our Lord one thousand nine hundred & three.

Test:

[SEAL.] HARRISON RIDER,
Register of Wills for Baltimore County.

29 EXHIBIT F.

For value received, and in pursuance of an order of the orphans' court for Baltimore county, Maryland, I hereby assign, transfer and make over to Richard Bernard and Alfred D. Bernard, executors under the last will and testament of Joseph Trainor, late of the Dis-

trict of Columbia, deceased, all our right, title and interest in and to the proceeds of benefit certificate No. 22899, issued by the United Order of the Golden Cross of the World to said Joseph Trainor, and therein made payable to Catherine W. Trainor, the wife of the said Joseph Trainor.

Witness my hand and seal this 26th day of May, 1903.

ALFRED D. BERNARD, [SEAL.]
Executor under the Last Will and Testament of
Katherine W. Trainor, Dec'd.

Witness:
I. A. COFFEY.

EXHIBIT G.

For value received, we and each of us doth hereby assign unto Richard Bernard and Alfred D. Bernard, executors under the last will and testament of Joseph Trainor, late of the District of Columbia, deceased, all our right, title and interest in and to the proceeds of benefit certificate No. 22899, issued by the United Order of the Golden Cross of the World to said Joseph Trainor, and therein made payable to Catherine W. Trainor, the wife of said Joseph
30 Trainor, which said Catherine W. Trainor predeceased the said Joseph Trainor, leaving the undersigned sister and brother as her sole heirs at law, personal representatives and next of kin.

Witness our hands and seals this 21st day of May, A. D. nineteen hundred and three.

FANNIE BERNARD. [SEAL.]
J. MARION DUNCAN. [SEAL.]

Witness:
ALFRED D. BERNARD.

Demurrer of Defendant.

Filed January 20, 1904.

In the Supreme Court of the District of Columbia.

RICHARD BERNARD and ALFRED D. BERNARD, Executors and Assignees,		
vs.	}	At Law. No. 46254.
THE SUPREME COMMANDERY OF THE UNITED Order of the Golden Cross of the World.		

Now comes the defendant by its attorneys and says that plaintiffs' last amended declaration is bad in substance.

NOTE.—Among the matters of law intended to be argued at the hearing of this demurrer are the following:

First. That the plaintiffs do not allege in their declaration
31 that the said Joseph Trainor "directed while living" that said sum should be paid to them or any of them.

Second. That the plaintiffs do not allege in their declaration that their names or any of them are "contained in the benefit certificate."

Third. That the plaintiffs do not allege in their declaration that they or either of them were members of the family of the said Joseph Trainor.

WILSON & BARKSDALE,
Attorneys for the Defendant.

Messrs. I. Q. H. Alward, William F. Hall, and Richard Bernard & Son, attorneys for plaintiff-.

GENTLEMEN: You will please take notice that we have set down the above demurrer for hearing before Mr. Justice Barnard on Friday January 29, 1904, at ten o'clock a. m.

WILSON & BARKSDALE,
Attorneys for Defendant.

32 Supreme Court of the District of Columbia.

FRIDAY, *February* 5, 1904.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

RICHARD BERNARD ET AL., Pl'ffs, *vs.* SUPREME COMMANDERY OF THE UNITED ORDER of the Golden Cross, &c., Def't.	At Law.	No. 46254.

Upon hearing the demurrer to the amended declaration filed January 18, 1904, it is considered that said demurrer be, and hereby is, overruled; with leave to the defendant to plead within ten days. The defendant notes an exception to above order.

33 *Pleas of Defendant.*

Filed February 16, 1904.

In the Supreme Court of the District of Columbia.

RICHARD BERNARD and ALFRED D. BERNARD, Executors and Assignees, Plaintiffs, *vs.* SUPREME COMMANDERY, UNITED ORDER OF the Golden Cross of the World, Defendant.	At Law.	No. 46254.

Now comes the defendant, by its attorneys, in the above entitled cause and for pleas to the plaintiffs' last amended declaration says:

1. It is not indebted in manner and form as alleged.

2. It did not promise in manner and form as alleged.

3. For a further plea the defendant says that the said plaintiffs ought not to have or maintain their action against it because it denies that the said Joseph Trainor applied to the defendant company to change the beneficiary under the said benefit certificate to the executor of his last will and testament; yet nevertheless, if the said Joseph Trainor did make such application, the said application was not made in accordance with the rules, regulations and laws, of the defendant company governing such applications. That among the general laws in force and effect and governing such applications to the defendant company, at the time of the death of the said
34 Joseph Trainor, and for, to wit, three years prior thereto, were sections 2 and 3 of law XVI, which provide as follows, to wit:

SECTION 2. Applicants shall enter upon the application blank the name or names and relationship or dependence of the members of their family, or those dependent upon them, to whom they desire their benefit paid, and the same shall be entered in the benefit certificate by the supreme keeper of records.

SECTION 3. Applications for change of benefit certificate must be signed by the applicant and the name or names of beneficiaries must be given as provided in section 2 for applicants for membership.

4. For a further plea the defendant says that the said plaintiffs ought not to have or maintain their action against it, because it denies that through its subordinate officer, W. S. Stetson, keeper of records of Halcyon Commandery, No. 128, it told the said Joseph Trainor that the beneficiary must be a dependent member of his own family; yet nevertheless, if the said W. S. Stetson gave the said Joseph Trainor such information, it was not at the request, direction, or with the knowledge, of the defendant company, and the said W. S. Stetson had no right, or authority, either officially, or personally, so to do.

5. For a further plea the defendant says that the said plaintiffs ought not to have or maintain their said action against it, because the said Joseph Trainor did not direct while living that the fund to become due under his benefit certificate should be paid to the plaintiffs, or to any of them; nor are the names of any of the
35 plaintiffs contained in the said benefit certificate. That among the objects of the incorporation of the defendant company set forth in its charter is the following, to wit:

"To establish a benefit fund from which a sum not to exceed $2000 shall be paid at the death of each member to his or her family, or to be disposed of as he or she may direct."

That the constitution thereafter adopted by the defendant company set forth among other objects of the order the following, to wit:

"To establish a benefit fund from which, on satisfactory evidence of the death of a beneficiary member of the order, who has com-

plied with all its lawful requirements, a sum not exceeding two thousand dollars shall be paid as he may have directed while living and as is contained in his benefit certificate."

That the aforesaid provisions of the charter and constitution were in force and effect at the time of the death of the said Joseph Trainor, and had been for some years prior thereto, to wit, three years.

6. For a further plea the defendant says that the plaintiffs ought not to have or maintain their action against it, because the said Joseph Trainor, for the purpose of procuring the issue to him of the benefit certificate set out in plaintiff's declaration, made a certain petition for membership in writing to the officers and members of Halcyon Commandery, No. 128, which said petition is dated the 9th day of December 1889. That among other things the said Joseph Trainor stated in said petition as follows:

36 "Having been made acquainted with the objects of your order, and fully endorsing them, I desire to become a member of your commandery. * * * And should I be accepted, I hereby covenant to obey all the laws, rules and regulations, governing this order."

That for several years, prior to the death of the said Joseph Trainor, certain laws, rules, and regulations were passed and promulgated by the defendant corporation for the government of the said defendant and all bodies subordinate thereto, and their respective members. That Halcyon Commandery No. 128, of which the said Joseph Trainor was a member, was one of the defendant's subordinate bodies. That among the said laws, rules and regulations in force and effect at the time of, and for to wit, three years prior to, the death of the said Joseph Trainor were certain general laws regulating the payment of certain monthly assessments. Section 3 of law XVII of said general laws provides as follows:

"On and after September 1, 1900, from each and every beneficiary member of the order who has previously received the degree of the golden star the amount of one assessment according to his age and rate, as provided for in section 1, shall, without notice, be due and payable on the first day of each and every month, or if the first day of the month falls on Sunday, on the second day of the month. A member who fails to pay this monthly assessment before midnight of the last day of the month in which it becomes due and payable, shall *ipso facto* stand disconnected from his

37 commandery and from the order, without sentence by the commandery."

Section 6 of law XVII of said general laws provides as follows:

"The disconnection or expulsion of any member shall work an immediate forfeiture of all claims of said disconnected or expelled member and of the beneficiary under his benefit certificate to any participation in the benefit fund."

That under section 3 of the aforesaid laws there was due November 1, 1902, from Joseph Trainor to the defendant corporation, as-

sessment No. 353 for $3.30, according to his age and rate, payable without notice before midnight of November 30, 1902. That the said assessment was not paid before midnight of November 30, 1902, to the defendant corporation, or to any authorized agent thereof, by the said Joseph Trainor, or by any one for him: so that by reason of the failure to pay the said assessment when due, the said Joseph Trainor became at midnight November 30, 1902, disconnected from Halcyon Commandery No. 128, and this defendant corporation, and remained so disconnected, up to the time of his death, December 2, 1902, and all claims of the plaintiffs to any participation in the benefit fund of the defendant corporation became thereby forfeited.

WILSON & BARKSDALE,
Attorneys for Defendant.

38 *Replication.*

Filed Feb. 29, 1904.

In the Supreme Court of the District of Columbia.

RICHARD BERNARD ET AL., Executors, &c.,
vs.
SUPREME COMMANDERY, UNITED ORDER GOLDEN CROSS. } Law. No. 46254.

And now come the plaintiffs into court by I. Q. H. Alward and Richard Bernard & Son their attorneys, and for replication to the pleas of the defendant say:

1. The plaintiffs join issue on the first plea of the defendant.
2. The plaintiffs join issue on the second plea of the defendant.
3. The plaintiffs join issue on the third plea of the defendant.
4. The plaintiffs join issue on the fourth plea of the defendant.
5. For replication to the defendant's fifth plea the plaintiffs say, that after the death of the beneficiary named in the certificate referred to in said plea, the said Joseph Trainor did undertake to direct who should be the beneficiary under said certificate, but that the defendant refused to make said change; that the said Joseph Trainor intended to name the plaintiffs as beneficiaries, and but for the act of the defendant they would have been so named, in said certificate; yet nevertheless the said Joseph Trainor did in his

39 lifetime designate the plaintiffs as beneficiaries.

6. For replication to the defendant's sixth plea, the plaintiffs say: That under the constitution and by laws of the defendant the said Joseph Trainor would have been entitled, upon payment of the assessment mentioned in the sixth plea, at any time during the month of December, 1902, to have become reinstated in said defendant; that the clause of the constitution and by laws of the defendant had been construed by it to give each member of the defendant an

additional thirty days within which to pay each and every assessment levied by the defendant; that no member was even reported disconnected until after the third Thursday of the month following the month in which the assessment became due; that over sixty per cent. of the members of Halcyon Commandery were technically disconnected each and every month; so that the officers of the defendant had and always regarded the constitution and by laws as giving each member an additional thirty days in which to pay his assessment. That before the said Joseph Trainor was reported disconnected he was known to have been dead by the defendant; and that within the said thirty days and within the time in which said Joseph Trainor would have had the right to have paid said assessment, the same was tendered to the defendant through Halcyon Commandery, and acceptance of same refused.

I. Q. H. ALWARD,
RICH'D BERNARD & SON,
Att'ys for Plaintiffs.

40 *Joinder of Issue.*

Filed March 29, 1904.

In the Supreme Court of the District of Columbia.

RICHARD BERNARD ET AL., &C.,
vs.
SUPREME COMMANDERY, UNITED ORDER OF the Golden Cross of the World. } At Law. No. 46254.

And now come the plaintiffs into court by I. Q. H. Alward and Richard Bernard & Son, their attorneys, and

5. The plaintiffs join issue on the fifth plea of the defendant.
6. The plaintiffs join issue on the sixth plea of the defendant.

I. Q. H. ALWARD,
RICH'D BERNARD & SON,
Attorneys for Plaintiffs.

Memorandum.

February 13, 1905.—Verdict for plaintiffs for $1,993.40, with interest from June 3, 1903.

41 Supreme Court of the District of Columbia.

FRIDAY, *February* 24, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

RICHARD BERNARD AND ALFRED D. BERNARD, Executors and Assignees, Pl'ffs,
v.
THE SUPREME COMMANDERY OF THE UNITED Order of the Golden Cross of the World, a Corp., Def't. } At Law. No. 46254.

Upon hearing the motion of the defendant for a new trial, it is considered that said motion be, and the same is hereby overruled, and judgment on verdict ordered: Therefore it is considered that the plaintiffs recover against the defendant the sum of one thousand nine hundred and ninety-three dollars and forty cents ($1993.40), with interest thereon from the 3rd day of June, 1903, at 6 % per annum until paid, being the money payable by it to the plaintiffs, by reason of the premises, together with their costs of suit to be taxed by the clerk, and have execution thereof.

The defendant notes an appeal to the Court of Appeals, and the penalty of a supersedeas bond on said appeal is fixed in the sum three thousand dollars ($3000).

42 *Memorandum.*

March 13, 1905.—Appeal Bond Filed.

Supreme Court of the District of Columbia.

THURSDAY, *March* 30, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

RICHARD BERNARD ET AL., Pl'ffs,
v.
SUPREME COMMANDERY, UNITED ORDER OF THE Golden Cross of the World, Def't. } At Law. 46254.

Now again comes here the defendant by its attorneys and tenders to the court here its bill of exceptions taken during the trial hereof, and prays that the same may be duly signed, sealed, and made part of the record, now for them, which is accordingly done.

43 *Bill of Exceptions.*

Filed March 30, 1905.

In the Supreme Court of the District of Columbia.

RICHARD BERNARD and ALFRED D. BERNARD, Executors and Assignees, *vs.* SUPREME COMMANDERY, UNITED ORDER OF the Golden Cross of the World.	At Law. No. 46254.

At the trial of the above entitled cause on the 13th day of February 1905, before Mr. Justice Barnard and a jury, the plaintiffs to maintain the issues on their part joined, offered certain documentary evidence the same being exhibits to their declaration, as follows to wit: The will of Joseph Trainor, and letters testamentary granted to Richard and Alfred D. Bernard by the registrar of wills for Baltimore county, Maryland; the will of Catherine Trainor and letters testamentary granted to Alfred D. Bernard by the registrar of Baltimore county, Maryland; an order of the court authorizing the said Alfred D. Bernard to assign to Richard and Alfred D. Bernard, executors, all the right, title and interest of the said Catharine W. Trainor in and to the proceeds of benefit certificate No. 22899 in the defendant commandery; also an assignment of all title and interest in and to the said certificate by Fannie Bernard and J. Marion Duncan to Richard and Alfred D. Bernard, executors. All these papers were duly certified and properly proven.

Thereupon the plaintiffs to further maintain the issues on their part joined produced as a witness *Alfred D. Bernard* who tes-
44 tified that he was an attorney and one of the executors of Joseph Trainor's will and that he did not know anything about the benefit certificate itself or about the issuance of it; that he found it among the papers of the deceased at his residence in this city 1427 S street, and that the "note" hereinafter referred to was in the handwriting of Joseph Trainor. Whereupon the benefit certificate was offered in evidence. Whereupon objection was made and the court said:

"I think as far as this policy is concerned, that it looks like an original, although their is the word "duplicate" written across it, in red ink, with the note of the member at the bottom, purporting to be written by the member, saying that it is not a duplicate, but the original. The paper itself appears to be an original. It is executed by the officers, and it bears something purporting to be a seal, so that I think on its face the paper, perhaps, is competent."

To the admission of said benefit certificate when offered and before it was admitted, counsel for defendant then and there objected on the ground that there was a material variance between the benefit

certificate set out in the declaration and the benefit certificate offered in evidence, the latter being the same as the benefit certificate set out in the declaration and having in addition the word " duplicate " written across the face in red ink with a memorandum at the bottom as follows, " Note: This is not a duplicate, but the original certificate. Joseph Trainor." and on the obverse side the alleged application of Joseph Trainor for a change of his benefit certificate, appearing in full hereinafter and counsel for defendant called for
45 the original; which objection was overruled by the court and the said certificate was admitted in evidence. Whereupon counsel for defendant reserved this, their first exception, which was duly noted by the court on its minutes.

Thereupon the plaintiffs to further maintain the issues on their part joined produced as a witness *James S. Sharpe*, who testified that he is a member of Halcyon Commandery of Washington, D. C., of the United Order of the Golden Cross, and knew the late Joseph Trainor; that W. S. Stetson who was keeper of records of Halcyon Commandery at the time of Joseph Trainor's death, died about a year ago, and was keeper of records December 19, 1902. Identifies the signature of Stetson on benefit certificate and also on the reverse side in the alleged application for change of beneficiary. Identifies writing of Stetson in body of letter dated December 19, 1902, and also identifies the signature of Joseph Trainor to, and in the body of, the alleged application for change of beneficiary.

Thereupon the plaintiffs to further maintain the issues on their part joined recalled as a witness *Alfred D. Bernard* and then offered in evidence a letter dated December 19, 1902 and heretofore identified by witness Sharpe, which is as follows:

" Messrs. Richard Bernard & Son, attorneys, Baltimore, Maryland.

GENTLEMEN: Your letter of 10th instant reached this commandery at its meeting this evening. I am directed by the commandery to inform you as follows: Mr. Joseph Trainor failed to pay the assessment due November 1st, and the last day for payment of which was November 30th. Thus he ceased to be a member of the order from and after midnight of November 30th. Had he lived he would, perhaps, have exercised his right to be readmitted within thirty days after November 30th; but, unfortunately, his death on December 2nd cut off that possibility.

46 I enclose slips, cut from the constitution now in force, which show the laws relating to disconnections and readmissions (passages marked).

I enclose a form for 'death-claim,' in the event that, in the exercise of your own judgment, you should determine to present a claim. The evidence required, as you will see, is the affidavit of attending physician and undertaker and statement of attending clergyman; also, if you make claim as executors, the proper certificate that you have qualified as such.

A subordinate commandery has no power to pass, for the order,

upon a death claim; that authority being vested in the supreme commander; hence the commandery officers would merely fill in the proper data from the commandery records, and forward the papers in proper course for action by the supreme commandery.

You have, perhaps, learned from Mr. Trainor that, soon after the decease of his wife, the beneficiary named in his benefit certificate, he applied for a new certificate to name as the beneficiary a gentleman whom he then intended to designate as his executor; but the supreme commander was compelled to refuse the application, as the laws of the order do not permit certificates to name as beneficiaries any except relatives of, or persons dependent upon, the member.

Yours sincerely,

W. S. STETSON,
Keeper of Records of Halcyon Commandery, No. 128.

(1309 S street northwest.)"

47 To the admission of said letter when offered and before it was admitted, counsel for the defendant then and there objected on the ground that it was not only irrelevant, but there was no proof that Stetson had authority to bind the defendant by such admissions and on the further ground that Stetson was then dead and any declarations or admissions made by said Stetson as agent for defendant were inadmissible under sec. 1064 of the Code, which objection was overruled by the court. Whereupon counsel for defendant reserved this their second exception, which was duly noted by the court on its minutes.

The witness further testified that he knew all the beneficiaries named in the letter of instructions except one, Etta May Cooke; that Richard Roland Duncan is the son of J. Marion Duncan; that Julia E. Duncan is the wife of J. Marion Duncan, and sister-in-law of Mr. Trainor; that Thomas Allender is a hired man who works for J. Marion Duncan.

The witness further testified that Mr. Stetson told him that after the death of Mrs. Trainor, Mr. Trainor applied to Halcyon Commandery to change the benefit certificate and that he, as the keeper of records, forwarded the application to the supreme commandery and that the supreme commandery sent the application back with a refusal on the ground that under the constitution and by-laws of their organization, as interpreted by them, they were not authorized, and were not compelled, to issue a certificate to any one other than a dependent member of the insured's family. That Mr. Trainor protested against the action and Mr. Stetson, at his request asked the supreme commandery to make a ruling for the benefit of

48 Mr. Trainor and the grand commandery refused; that Stetson further stated that Mr. Trainor was technically in default on and after midnight of November 30, but that they had a clause of their constitution and by-laws which gave the right to any member within 30 days after the assessment became due, to be reinstated on paying simply the assessment in arrears; that Mr. Trainor had

been disconnected from the organization fifty times during the twelve years he had been a member; that his assessment was frequently paid by officers of the company; that about sixty per cent. of the members of Halcyon Commandery were technically disconnected every month by reason of the non-payment of their assessments.

To the admission of all the testimony in the preceding paragraph when it was offered and before it was admitted counsel for the defendant then and there objected on the ground that it was not only irrelevant, but there was no proof that Stetson had authority to bind the defendant by such admissions, and on the further ground that Stetson was then dead and the witness being a surviving party was not competent to testify to any admissions or declarations made by said Stetson as agent for defendant, which objection was overruled by the court. Whereupon counsel for defendant reserved this their third exception, which was duly noted by the court on its minutes.

Whereupon the letter of instructions of Joseph Trainor to his executors as set out in the declaration was produced and witness testified that he was acquainted with the handwriting of Joseph Trainor and he recognized the body of the letter and the signature thereto to be in the handwriting of Joseph Trainor, whereupon said letter was offered in evidence.

49 To the admission of said letter when offered and before it was admitted, counsel for defendant then and there objected on the ground of immateriality, because the letter purports to be of a private nature to his executors and there is no testimony that it was ever brought to the attention of the defendant or that the defendant had any knowledge of its existence, which objection was overruled by the court and the said letter was admitted in evidence. Whereupon counsel for defendant reserved this their fourth exception, which was duly noted by the court on its minutes.

The witness further testified that on December 19, 1902, as personal representative and executor of the late Joseph Trainor, he tendered to Mr. Meston the financial keeper of records the assessments for November and December 1902.

To the admission of the foregoing testimony when it was offered and before it was admitted counsel for the defendant then and there objected on the ground that a tender at that time, after the death of the insured, was immaterial and irrelevant, which objection was overruled by the court. Whereupon counsel for defendant then and there reserved this their fifth exception which was duly noted by the court on its minutes.

The witness further testified that Meston refused to accept said assessments and said he knew Trainor died December 2 and that when he reported him disconnected December 10 that he knew he was dead; that Meston said they never regarded the provisions of the constitution and by-laws as binding within the first thirty

50 days; that any time within that thirty days he would take the money from the member without any application for re-

instatement at all; that on the first meeting night he had to balance his cash and if his cash was short over and above the regular assessment that he was to collect he had to balance it with disconnected members; that Mr. Sharpe who had been in the habit of paying the assessment of Mr. Trainor was ill that night and could not attend the meeting and that Mr. Stetson made a statement to that effect; that Mr. Trainor had expressed himself at various times about not wanting this money to go to his wife's personal representatives and he supposed Mr. Trainor had gotten careless about it, and for that reason he was worried for fear if he advanced the assessment, he could not get it back; that they were in the habit, while they did not consider that they were obliged to do it; of sending notices out to various disconnected members; that from fifty to sixty per cent. of the members of Halcyon Commandery were technically disconnected every month, and that they did not think of reporting anybody disconnected until after the 10th of the month; that Mr. Trainor was almost invariably late in paying his assessment, and that it was frequently paid for him by Mr. Sharpe, though he was not the collector for the defendant; that they did not keep a collector, but sent out a card on the first of every year, which contained twelve blanks representing the twelve assessments; that there was an assessment levied as of December 1, due on or before December 31, and that assessment was levied after Mr. Trainor was technically disconnected; that if Mr. Trainor was disconnected November
51 30, there was another assessment levied December 1st, and due on or before December 31, and he advised witness to tender that too and he did; that the assessments were $3.30 each and witness tendered $6.60; that Meston said he would like very much to take it but could not; that he had reported Mr. Trainor disconnected to the grand lodge; that he furnished witness with blank proof of death, which was admitted by counsel for defendant to have been received and was in due form.

The witness then produced and it was offered in evidence the written application of Fannie Bernard and J. Marion Duncan, heirs and personal representatives of the deceased beneficiary, Alfred D. Bernard, executor, and Richard Bernard and Son, attorneys, for the reinstatement of the said Joseph Trainor, the same being dated December 19, 1902.

To the admission of said application when offered and before it was admitted counsel for defendant then and there objected on the ground of its immateriality, for the reason that it was made after the death of the insured, which objection was overruled by the court. Whereupon counsel for defendant reserved this their sixth exception, which was duly noted by the court on its minutes.

The witness then produced and it was offered in evidence a copy of the charter, constitution and general laws of the defendant. It is agreed between counsel that the same may be referred to in full but the following extracts are the only parts of the charter, constitution

and general laws necessary to transcribe in the record of the case, viz:

52 The charter in defining the objects of the order provides in paragraph 3. To establish a benefit fund from which a sum not to exceed $2000 shall be paid at death of each member to his or her family, or to be disposed of as he or she may direct.

Constitution, Art. 2, Sec. 1. The objects of the order are as follows: * * * 3d. To establish a benefit fund from which, on satisfactory evidence of the death of a beneficiary member of the order who has complied with all its lawful requirements, a sum not exceeding two thousand dollars shall be paid as he may have directed while living and as is contained in his benefit certificate.

Law 12, Sec. 3. Persons who have been members of the order but are disconnected for the non-payment of dues or assessments desiring again to obtain membership, can do so within 30 days after their disconnection on payment of the arrearages for which they were disconnected, and such a fine as the commandery may by by-laws provide. It shall be the duty of the financial keeper of records to report such reinstatements and the dates of the same to the commandery at its next regular meeting. If more than thirty

53 but less than ninety days have elapsed since their disconnection, they must apply to the commandery of which they have been members, and must comply with the following conditions: The payment in full of all dues, assessments and fines charged against them and unpaid at the date of their disconnection, and all dues that would have been charged against them during the period of their disconnection had they remained members of the order. They shall also furnish the commandery with a certificate from a medical examiner of the order approved by the supreme medical director, as to their physical condition and fitness. They must also pay into the benefit fund assessments according to the rates established for the age which they have attained at the time of restoration. No one past fifty-two years of age can be restored to the order. A ballot shall then be ordered by the noble commander, and if a majority of the ballots cast are favorable, the applicant shall be declared a member; otherwise he shall be declared rejected. A person disconnected for ninety days, applying for membership, must do so as if he had never been connected with the order, provided that application be made to the commandery of which the applicant was formerly a member, or that said commandery shall give him written permission to join some other commandery.

Law 16, Sec. 2. Applicants shall enter upon the application blank the name or names and relationship or dependence of the members of their family, or those dependent upon them, to whom they desire their benefit paid, and the same shall be entered in the benefit certificate by the supreme keeper of records.

SEC. —. Applications for change of benefit certificate must be signed by the applicant and the name or names of beneficiaries must be given as provided in section 2 for applicants for membership.

Law 17, Sec. 3. On and after September 1, 1900, from each and every beneficiary member of the order who has previously received
54 the degree of the golden star the amount of one assessment according to his age and rate as provided for in section 1 (in the case at bar $3.30) shall without notice, be due and payable on the first day of each and every month, or, if the first day of the month falls on Sunday, on the second day of the month. A member who fails to pay this monthly assessment before midnight on the last day of the month in which it becomes due and payable, shall *ipso facto* stand disconnected from his commandery and from the order, without sentence by the commandery.

* * * * * * *

Sec. 6. * * * The disconnection or expulsion of any member shall work an immediate forfeiture of all claims of said disconnected or expelled member and of the beneficiary under his benefit certificate to any participation in the benefit fund.

Sec. 7. On or before the 10th day of each and every month the financial keeper of records of each commandery shall forward to the supreme treasurer the full amount due from his commandery on account of members who have paid the preceding monthly assessment as provided by law, and the amount due on account of members reinstated since the rendering of the last preceding assessment report.

On cross-examination the witness testified that the assessment due from Mr. Trainor November 1, 1902, payable in 30 days was not paid by him before his death and that he died December 2, without having paid it or the assessment due December 1 and payable on or before December 31st. Here it was explained that Halcyon Commandery was one of 22 or 23 local commanderies of the District of Columbia subordinate to a grand commandery and the latter was subordinate to the supreme commandery, which is a corporation, the remittance being made from the local commandery direct to the treasurer of the supreme commandery.

Thereupon to further maintain the issues on their part joined the plaintiffs recalled James S. Sharpe who testified that Mr.
55 Trainor frequently gave him money to pay his assessments; that any member desiring to pay his assessment could come to the commandery meeting held twice a month or he could go to the house of the financial keeper of records, who had authority to receive money and receipt for it; that it was a fraternal organization as well as a beneficial one, and their obligations were such that every member guarded the interest of every other member and it was customary and had been done frequently, where a person had died, the money would be paid; or, when they could not attend the meeting rather than have them in arrears, it had been tendered and receipted for; that nobody was ever reported disconnected until

after the first meeting night in the month for the reason they would not know that the assessments had not been paid until then; that Mr. Meston frequently took assessments up to and inclusives of the first meeting; that each member was given a card with twelve assessments on it and he was told when it was due and payable, viz: on the last day of each and every month without notice; that the secretary frequently notified members that they were delinquent; that Mr. Trainor had been frequently disconnected but, to say fifty times would be an exaggeration, and he had thirty days to reinstate himself; that the order exacted a three cent fine upon a member's reinstatement and witness did not know of its ever being waived; that Mr. Trainor never made a formal application for reinstatement and never passed a medical examination; that he was reinstated by paying the assessment; that the commandery seldom likes to have any disconnections and to avoid them some member would pay the assessment, and when the member paid up his dues, he would be reimbursed.

Thereupon counsel for the plaintiffs offered in evidence the application of Joseph Trainor to change the beneficiary on his
56 benefit certificate to J. Marion Duncan, the executor of his last will, which application appears on the back of the benefit certificate and is in the words and figures as follows:

"*Beneficiary herein—Catherine Trainor,—now deceased.* Surrender and application for change of benefit certificate, (law 2, secs. 3 and 4). I hereby surrender the within benefit certificate No. 22,899 and direct that a new certificate be issued to myself, as a *full* rate member for *$2000.*, and made payable to the following named beneficiaries, *J. Marion Duncan* [brother in law late wife's brother]* *named executor of my last will and testament.* Dated this 13th day of *November 1900.*

(Signed) *JOSEPH TRAINOR,* Member.

THOS. HUMPHRY, N. C.
W. S. STETSON, K. of R.

(*$1.00 enclosed.*)

Erasure made by Kt. Joseph Trainor his intent being that said Duncan shall receive solely as executor.

The parts in italics in the body are in the handwriting of Joseph Trainor; the rest is all printed, except the signatures of Thos. Humphry and W. S. Stetson; the explanation of the erasure is in the handwriting of W. S. Stetson, as is also the line at the top in italics.

To the admission of said written application when offered and before it was admitted, counsel for defendant then and there objected

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[* Words enclosed in brackets erased in copy.]

on the ground not only of its immateriality but because said application did not conform to the requirements of law 16 secs. 2 and 3, which objection was overruled by the court. Whereupon counsel for defendant reserved this their seventh exception, which was duly noted by the court on its minutes.

Upon cross-examination the witness testified that when a member failed to pay his assessment by midnight of the last day of the month he was disconnected by law and had the right himself
57 to make application for reinstatement by payment of assessment; that he did not know of any instance where the executors of a deceased member were ever permitted to pay the assessment within thirty days after he had been disconnected although he had been treasurer for a number of years; that sometimes a member who was disconnected by failure to pay dues would get a friend to pay for him and that friend would look to the member for reimbursement.

Whereupon witness was asked on cross-examination the following questions:

Q. Wherever a member had failed to pay his assessment at the time that it was due, he knew that he would be disconnected by twelve o'clock of the last day of the month, and depended on the right to be reinstated? A. Certainly, he should be aware of it, because he is given instructions.

Q. And he understood, of course, that if he died after the date that that assessment was due and before its payment, that he lost all benefit, did he not? A. Well, he would stand disconnected from the order under the by-laws.

Q. And he knew what was the penalty of disconnection? A. Yes, sir.

Q. That penalty of disconnection was that a man lost all his rights and benefits under his benefit certificate, was it not? A. It so states in the by-laws.

Whereupon witness further testified that he was not the proper officer to receive assessments and had no official right to receive them and that he did it for Mr. Trainor simply as an act of kindness and favor to him; that he did not receive Mr. Trainor's assessments as an officer, but merely as a friend; that when he paid the assessments for Mr. Trainor he paid them as a friend; that Mr. Trainor had a card in his possession showing the amount of
58 the monthly assessments and when due, because witness frequently took the card when he would pay his assessments; that the assessment due November 1st, was payable on or before November 30th, at midnight and the assessment due December 1st was payable on or before midnight December 31st; that Mr. Trainor had failed to pay his November assessment and by the rules of the order he was disconnected just the same as a live man would have been disconnected if he had failed to pay; that he would have been disconnected the same as if he had died.

On re-direct examination the witness testified that he did not know whether he could recall a case where a payment was made for a man after he was known to be dead; that assessments had been paid after a man was dead; that he did not recall any instance where the assessments of any member were refused by the local commandery during the second month. That a small proportion of the local commandery attended the meetings.

On recross examination the witness testified that he could remember no more than one instance, and that was 4 or 5 *5* years ago, where an assessment was tendered after a man's death; that he did not know when that member died; that he was ill quite awhile and he did not know how soon after the assessment was due and payable that he died; that the assessments were paid by Mr. Meston and the commandery reimbursed him purely as an act of charity and not compulsory under the law; that he as treasurer of commandery refunded the money advanced by Mr. Meston; that he did not know how much in default the member was.

Whereupon the witness was asked the following questions:

Q. Is it not a fact, now, Mr. Sharpe, that Mr. Cline died within the month that that assessment was due? A. Certainly he did.

Q. He did? A. Yes.

59 Q. He was not disconnected then, was he? A. No; because his assessments were paid for him.

Q. So as a matter of fact, this instance you recall was where a man died, and we will say the assessment was made on the 1st of November and was payable on or before the 30th, and he died within that month? A. Yes; he died within that month, when the report went on to the supreme commandery stating the facts in the case, and that assessment has to be reported as paid.

Q. Yes. A. The commandery, through Mr. Meston, being a friend and fellow-member, paid this assessment. A vote was taken in the commandery, of which I was the treasurer, to reimburse Mr. Meston for the amount that he had paid for Sir Knight Cline, and I paid it to Mr. Meston.

Q. That was paid out of the general fund, was it not? A. Yes.

Q. It was not paid out of the beneficial fund? A. No; we cannot pay anything out of that.

Q. So that the instance which you relate, where a man had been reinstated after his death, was a case where the man had actually paid his assessment within the month it was due, was it not? A. Well, it was paid, as I told you, by his friend.

Q. It was paid by a friend? A. Yes; and this member, if he died after the 1st of the month, between that and the 30th, there is an assessment due on the 1st of the month, but you have thirty days in which to pay that assessment. So, if he dies any time within that month, there is an assessment due before the 30th, and that assessment must be paid.

Q. Yes; and the man would have a right to pay it at any time, himself or through his friend, before his death? A. If he has a

friend there to pay it, he does not have to call on his representative to pay it.

Q. That was the understanding in the case you have just
60 recited; Mr. Meston was a friend, and paid it within the month and before the death of the member? A. Yes.

The COURT: Would not the commandery take that after the man's death, if his friend offered to pay it for him, after he was dead, as long as he had the whole month in which to pay it?

The WITNESS: Somebody would volunteer to pay it, frequently, to keep the man from losing his benefits.

The COURT: Do you know of any case where it happened that a man died during a month, and his dues had not been paid because he had a whole month in which to pay them; and as he died before the end of the month, his friends were allowed to pay the dues, or his representatives at that time?

The WITNESS: Yes, sir; they would be allowed to pay it.

Mr. BARKSDALE: They would be allowed to pay it before his death?

Mr. RICHARD BERNARD: No; after his death.

By Mr. BARKSDALE:

Q. They would be allowed to pay it before his death? That is my question. A. Yes; because when a member dies, and there is an assessment due, when they go to the house to see the representatives, they are notified that there is an assessment due, and they pay it, after he is dead. That pays up all the dues that are due in that month, because it is due on the 1st, and must be paid at any time between that and the 30th.

The COURT: In this case you speak of, of Mr. Cline, if the treasurer had not paid it for him, when he made up his report, why the executor would have been allowed to pay it, or his beneficiary, dur-
ing that month?

61 The WITNESS: Yes, sir; before Mr. Meston had made out his report to the supreme commandery.

The COURT: Yes.

The WITNESS: It has got to be paid before his report is made to the supreme commandery, with proofs of death.

By Mr. BARKSDALE:

Q. Which report goes in on the 10th of the month, does it not? A. Now it does.

Whereupon witness further testified that he knew of no instance where an executor had been allowed to pay after a member's death as there has never been an instance of that kind in the commandery; that he did not recall an instance where the personal representatives of a dead member were refused permission to pay an assessment; that he did not think there had ever been a case of the kind in the commandery; that he did not know of an instance where the per-

sonal representatives were permitted to pay after death and after disconnection.

And thereupon the plaintiffs announced their case closed.

62 Thereupon the defendant to maintain the issues joined on its part produced as a witness ROBERT D. MESTON who testified that he is financial keeper of records of Halcyon Commandery and has held his office since 1887 and that he is the proper officer to receive payment of assessments from the members of Halcyon Commandery; that he knew Joseph Trainor from 1890 to the date of his death; that Mr. Trainor received the degree of the golden star and subscribed to the constitution and by-laws of the order; that he knows the signature of Joseph Trainor and identifies it as attached to the paper then offered in evidence by defendant, the same being the original application for membership in the defendant organization by and under the terms of which the said Trainor covenanted "to obey all the laws, rules and regulations of the order" that under the laws in force at the time of Mr. Trainor's death and for two years prior thereto, Mr. Trainor's assessment was $3.30 a month payable to witness as financial keeper of records; that Mr. Trainor did not pay his assessment due on November 1st and payable on or before midnight of November 30th; that he notified the supreme keeper of records November 10th, that Mr. Trainor was disconnected for non-payment of the November assessment; the original report was here offered in evidence by counsel for defendant showing that Joseph Trainor was disconnected from the order for failure to pay $3.30, the amount of assessment No. 353 due November 1 and payable on or before November 30, 1902, and that he died December 2, 1902; that witness is required to make a monthly report of all assessments paid and all disconnections that occurred during the preceding month; that on December 5th he made his first official entry of Mr. Trainor's disconnection for failure to pay the November assessment and of his death occurring December 2d; and the book with said entry was offered in evidence by counsel for defendant; that generally speaking Mr. Trainor was prompt in the
63 payment of his assessments, but on several occasions Mr. Sharpe paid his assessments at the first meeting of the month; after disconnection for failure to pay; that there were occasions when Mr. Trainor paid witness after he had been disconnected; that on one occasion when Mr. Trainor paid his assessment late, witness told him that a man in his condition ought to pay his assessment when due, because he was liable to fall dead at any moment; that on one occasion Mr. Trainor said that he did not care very much whether he was disconnected or not; that he did not wish the relatives of his wife to get the insurance; that the relatives of his wife had said things to him he did not like; Mr. Trainor said he new he might drop dead and there would be trouble over his insurance; that Mr. Trainor at one time held the position of keeper of records or corre-

sponding secretary; that Mr. Trainor usually paid his assessments at witness's house which was about three squares from where Mr. Trainor lived.

On cross examination the witness testified that he had other employment, but generally speaking he was at home in the evening; that receiving assessments at his home was for convenience of the members; that he knew Mr. Trainor was dead before he reported him disconnected; but he was not going to be responsible for his assessment; that he did not tell Mr. Bernard that he would have taken the assessment if it had been tendered that night; that he knew Mr. Trainor was dead on December 2d; that he intimated the fact of his death to the local commandery at its meeting on December 5th and did not officially notify the supreme commandery until
December 10th after he knew Trainor was dead; that he did
64 not state that if Mr. Sharpe had tendered the assessment on the evening of the meeting, he would have taken them; that Mr. Bernard tendered assessment for November and that he advised Mr. Bernard to tender the December assessment also; that in answer to a question by the court the witness said that he could not answer whether he would have taken the assessments if they had been paid before December 10th or not; that
65 they have never had a case of that kind; that if Mr. Trainor had been alive he would have taken the assessment at any time during December; that he would have reported him disconnected and then reinstated; that method of reinstatement consisted in paying up all arrearages and he had to come there personally; that the payment of assessments was deemed sufficient to warrant reinstatement without formal application if it was made by a friend who signified that the member was well, alive and in good condition; that Mr. Trainor had been disconnected on quite a number of occasions; that Mr. Trainor never made a formal written application for reinstatement; that he simply paid his dues and was reinstated as a matter of course. That an assessment was levied December 1st and payable any time during December, which assessment was tendered.

Whereupon on re-direct examination the witness was asked the following question:

Q. As a matter of fact, Mr. Meston, there was no levy of an assessment made against Mr. Trainor in December, was there? A. Only an official notice from the supreme keeper of records which I have here. This is a notice to all members of the order to pay this assessment, signed by W. R. Cooper, supreme keeper of records.

Thereupon this being all the testimony in the case both sides announced their case closed.

Whereupon counsel for defendant then asked the court upon all the evidence to direct the jury to return a verdict for the defendant which request was refused by the court and counsel then and there

reserved this their eighth exception to the court's refusal so to do, which exception was noted by the court on its minutes.

Whereupon the court granted the two prayers on behalf of the plaintiffs hereinafter appearing in the court's charge to the jury.

66 Whereupon counsel for the defendant asked the court to grant the following prayers:

I. That the jury are instructed to return a verdict for defendant.

Refused.

II. The jury is instructed that if they believe from the evidence that the deceased Trainor failed to pay his assessment for November, 1902, and that he died on December 2, 1902, without having reinstated himself, then the plaintiff can not recover.

Refused.

III. If the jury believe from the evidence that under the laws of the defendant company that Trainor was disconnected at the time of his death, then they are instructed that there can be no recovery upon his benefit certificate.

Refused.

IV. The jury are instructed that if there was only one instance in which the defendant allowed a member to be reinstated, then they are instructed that one instance can not be construed into a custom binding the defendant.

Refused.

V. The jury is instructed that if they find that Joseph Trainor was a member of the order and was disconnected for non-payment of dues or assessments, and failed to reinstate himself in thirty days as provided by the by-laws of the order, then they are instructed that the right of reinstatement does not accrue to his personal representatives, and that this tender of assessments by his personal representatives will not entitle his beneficiary to recover.

67 To the granting of the first prayer on behalf of the plaintiffs and to the refusal to grant the aforesaid prayers on behalf of defendant, counsel for the defendant then and there objected, which objection was overruled and counsel for defendant reserved this their ninth exception which was noted by the court on its minutes.

The court then charged the jury as follows:

68 *Charge to the Jury.*

The COURT: Gentlemen of the jury, of course you understand by this time what this action is. It is brought to recover the amount of an insurance certificate or a membership certificate in this fraternal order; and the whole difficulty arises out of the fact that at the time of the death of the member, two days before the death of the member, the assessment that should have been paid was not paid. If that assessment had been paid within the month of November, there would have been no legal question at all; and the

main fact to be submitted to you is the fact as to whether or not this local order, the commandery here, had so acted that the members could rely upon another month's leniency in regard to the payment of these dues, without any forfeiture of their right of membership.

It is for you to find from the evidence what was the practice of this local order with reference to the payment of these dues. If they had, in all fairness, another thirty days in which to make the payment, and that was all they had to do, simply to make the payment, then members might be entitled to rest upon that; that is, they would be entitled to the benefit of that time, and the company would waive the strict letter of the by-law with reference to it, simply by the fact that they had not acted under that by-law, but had acted contrary to it. So that it depends upon whether or not that was the practice of the company, for the members to allow their dues to become delinquent, and then tender their payment and they payment would be received. So that you must find from the testimony whether or not that was the fact.

69 I will give you the instructions that has been granted with reference to that, in the language of the prayer that has been asked for by the plaintiffs' counsel:

1. "The plaintiffs pray the court to instruct the jury that if they believe from the evidence that Joseph Trainor deceased was the insured under the policy of insurance or benefit certificate offered in evidence in this case, and they shall further find that the said Joseph Trainor in his lifetime designated the plaintiffs Richard Bernard and Alfred D. Bernard executors, the beneficiaries under said policy or benefit certificate by a paper writing offered in evidence as a letter of instructions, wherein the said fund is specially designated and ordered distributed; and shall further find that the sole personal representatives and next of kin as well as the executor of Katherine W. Trainor, the deceased wife of the said Joseph Trainor, assigned all their right, title and interest in said benefit certificate to the plaintiffs, then their verdict shall be for the plaintiffs provided they shall further find that at the time of the death of the said Joseph Trainor, there was a custom of the local commandery of the defendant to give the member an additional thirty days in which to pay his assessment, and shall further find that during said thirty days' extension, the said assessments then due and payable were tendered to the defendant through its proper local financial secretary."

And if you find in favor of the plaintiff-, then the amount of the verdict should be according to this prayer:

2. "If the jury find for the plaintiff- they shall find for the
70 amount of the face of the policy with interest thereon from June 3rd, 1903, less the sum of six 60/100 dollars, the same being the two assessments levied and tendered by the plaintiffs."

It is for you to weigh the testimony and give such credence to it as you think it is entitled to, and to consider all the circumstances of the case.

Mr. WILSON: Before the jury goes out, if your honor please, I

want your honor to instruct the jury that the payment of an assessment by a disconnected member within thirty days after disconnection is not evidence of custom of a waiver of the by-law which provides that payments may be made within that time. My idea is this: I want to cover this point: That where there is a by-law covering the point, requiring the acceptance of it, that there cannot be any waiver, or cannot be any custom——

The COURT: I cannot give that, because it is the very purpose of these customs to waive by-laws. It is only a question of fact whether they did or not. There is no question about the by-law and what it provides. The question is whether they disregarded that in their practice, and gave the members this additional time, without going through any other formality other than simply paying the money, amounting really to an extension of thirty days, without other formality than the mere payment of the money.

Mr. WILSON: To the latter statement of your honor I except, as well as to the refusal of the other proposition.

The COURT: Yes. (To the jury:) Take the case, gentlemen.

71 The jury thereupon retired to consider of their verdict and returned a verdict for the plaintiff- in the sum of $1993.40 with interest from June 3, 1903, which verdict upon motion for new trial the court refused to disturb.

All of the exceptions shown in the foregoing bill of exceptions were duly noted by the court in its minutes at the time the same were severally taken, and before the jury retired to consider their verdict and the several exceptions are signed as the several exceptions taken at the trial of the above entitled cause and made a part of this record, and the foregoing bill of exceptions is signed and sealed now for then this 30th day of March 1905.

JOB BARNARD, *Justice.* [SEAL.]

Approved M'ch 29, 1905.

RICH'D BERNARD & SON, *For Pl't'fs.*

Defendant's Designation of Record.

Filed March 30, 1905.

In the Supreme Court of the District of Columbia.

RICHARD BERNARD and ALFRED D. BERNARD, Executors and Assignees, Plaintiffs,
vs.
SUPREME COMMANDERY, UNITED ORDER OF the Golden Cross of the World.
} At Law. No. 46254.

72 The clerk in preparing the transcript of record for the Court of Appeals in this case will embody the following, to wit:

1. Plaintiffs' amended declaration filed January 18, 1904.
2. Demurrer to amended declaration filed January 20, 1904.
3. Order of February 5, 1904, overruling demurrer.
4. Pleas of defendant filed February 16, 1904.
5. Joinder in issue on pleas 1, 2, 3 and 4 filed February 29, 1904.
6. Joinder in issue on pleas 5 and 6 filed March 29, 1904.
7. Verdict of jury.
8. Judgment on verdict and appeal noted and order fixing bond.
9. Bond filed March 13, 1905.
10. Bill of exceptions and order making them a part of the record.

WILSON & BARKSDALE,
Attorneys for Defendant.

Appellee's Designation of Record.

Filed April 5, 1905.

In the Supreme Court of the District of Columbia.

RICHARD BERNARD ET AL., Executors,
vs.
SUPREME COMMANDERY, UNITED ORDER Golden Cross of the World.
} At Law. No. 46254.

73 The clerk in preparing the transcript of record for the Court of Appeals in this case will embody the following to wit.

Exhibits A to G filed with the original declaration and asked to be taken as part of the amended declaration.

RICH'D BERNARD & SON,
Attorneys for Plaintiffs.

74 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 73, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 46,254, at law, wherein Richard Bernard and Alfred D. Bernard, executors and assignees, are plaintiffs, and The Supreme Commandery of the United Order of the Golden Cross of the World, a corporation, is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 24th day of April, A. D. 1905.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1544. The Supreme Commandery of the United Order of the Golden Cross of the World, a corporation, appellant, *vs.* Richard Bernard and Alfred D. Bernard, executors and assignees. Court of Appeals, District of Columbia. Filed Apr. 24, 1905. Henry W. Hodges, clerk.

Court of Appeals of the District of Columbia.

SUPREME COMMANDERY, UNITED ORDER OF THE GOLDEN CROSS OF THE WORLD,
Appellant,
vs.
RICHARD BERNARD AND ALFRED D. BERNARD, Executors and Assignees,
Appellees.

No. 1,544.

BRIEF ON BEHALF OF APPELLANT.

ANDREW WILSON,
NOEL W. BARKSDALE,
Attorneys for Appellant.

Court of Appeals of the District of Columbia.

SUPREME COMMANDERY, UNITED ORDER OF THE GOLDEN CROSS OF THE WORLD, *Appellant,* *vs.* RICHARD BERNARD AND ALFRED D. BERNARD, Executors and Assignees, *Appellees.*	No. 1,544.

Brief on Behalf of Appellant.

STATEMENT OF CASE.

This is an appeal by the defendant from a verdict against it by a jury in a suit on a benefit certificate. The defendant is sued as a corporation organized for the purpose, as set out in its charter, among other things, of establishing a benefit fund, from which on "the death of a beneficiary member of the order who has complied with all the lawful requirements" shall be paid a sum not exceeding $10,000 "to his or her family, or *to be disposed of as such deceased member may have directed, under such rules and regulations as may be provided by the constitution and by-laws of said corporation.*"

The constitution provides that upon "the death of a beneficiary member of the order, who has complied with all its lawful requirements, a sum not exceeding $2,000 shall be paid *as he may have directed while living and as is contained in his benefit certificate.*"

The by-laws require applicants to enter upon the application blank the names and relationship or dependence of the members of their family, or those dependent upon them, to whom they desire their benefits paid; that such information and designation shall be entered in the benefit certificate by the Supreme Keeper of Records; and that applications for change of benefit certificate shall be signed by the applicant and the names of beneficiaries given as required for applicants for membership.

The benefit fund of the defendant is created and maintained by monthly assessments against each member of the order, the amount regulated by his age and rate. These assessments under the by-laws are due and payable without notice on the first day of each and every month, and a member who fails to pay this monthly assessment, before midnight of the last day of the month in which it becomes due and payable, stands *ipso facto* disconnected from the order, without sentence of the defendant. The by-laws further provide that the disconnection or expulsion of any member shall work an immediate forfeiture of all claims of the disconnected or expelled member and of the beneficiary under his benefit certificate to any participation in the benefit fund.

Joseph Trainor was a member of the defendant order, and there was due from him, according to his age, a monthly assessment of $3.30. On December 2, 1902, the said Joseph Trainor died, having failed to pay, before midnight of the last day of November and up to time of his death, the assessment due and payable November 1, 1902, and he thereby became disconnected from the defendant order, and was never reinstated. The proper officer of the defendant,

as required by the by-laws, reported the said Trainor to the Supreme Commandery as dead and disconnected on December 10, 1902; thereafter Trainor's executors, on, to wit, December 19, 1902, tendered $6.60, the amount due the defendant for the November and December assessments, which was refused.

As Joseph Trainor (1) was disconnected from the order on November 30, 1902, and was never thereafter reinstated; (2) as he was not in good standing in the order at the time of his death; (3) as the benefit certificate made the fund payable only to Catherine Trainor, his wife, and she had predeceased him; (4) as Joseph Trainor gave the defendant no direction "while living," and none was "contained in the benefit certificate," to pay said sum to the plaintiffs, the defendant refused payment; whereupon this suit was instituted.

STATEMENT OF PLEADINGS.

The declaration, after setting out the different capacities in which plaintiffs sue, alleges that the defendant is a corporation authorized by its charter to issue benefit certificates to its members payable at the death of the member, as he or she may have directed while living, and as contained in the benefit certificate (R. 2); that Joseph Trainor had issued to him a benefit certificate in the defendant corporation for $2,000, payable to Catherine W. Trainor, wife, in accordance with and under the provisions of the law governing said benefit fund, provided he should be *in good standing at the time of his death*, and that *disconnection should work an immediate forfeiture of all claims* against the benefit fund (R. 3); that defendant's charter provided that it was its purpose to "establish a benefit fund from which a sum not to exceed $2,000 shall be paid at the death of each member to his or her family, or to be disposed of as he or she may

direct"; that Trainor paid his assessments up to the assessment levied as of November 1, 1902, and payable in thirty days thereafter, at and after which time the said Trainor stood technically disconnected, but that the said Trainor, had he lived, would have been entitled at any time during December, 1902, to become reinstated (R. 3); that before the expiration of said thirty days the said assessments were tendered the defendant, and acceptance refused; that the said Trainor, at the time of his death, was in good standing (R. 4).

That Catherine W. Trainor, the beneficiary named in said certificate, predeceased Joseph Trainor, and that soon thereafter Joseph Trainor applied to the defendant to change the beneficiary to a then contemplated executor, which change the defendant refused to make, and the defendant, through one of its officers, told Trainor that the beneficiary must be a dependent member of his own family. That the said Trainor was advisd that upon failure to designate a beneficiary that the fund would go to the personal representatives of his wife, and thereafter Trainor entered into an agreement with said representatives to pay over whatever sum they might receive to the executors or administrators of said Trainor (R. 4); that thereafter the said Trainor executed a private letter of instructions to his executors directing how the fund should be distributed (R. 5); that by reason of the application to the defendant, the agreement with the personal representatives of Catherine W. Trainor, and the letter of instructions, the said Richard Bernard and Alfred Bernard, executors, became entitled, under the constitution and by-laws, to said fund, and they are the only persons entitled to receive the same (R. 6).

The defendant filed a demurrer contesting the right of plaintiffs to recover on the ground that there was no allegation in the declaration that the said Joseph Trainor directed, while living, that the fund should be paid to the plaintiffs,

and that their names were not contained in the benefit certificate; and furthermore, that there was no allegation that plaintiffs were members of Joseph Trainor's family. This demurrer was overruled by the Court, to which counsel for defendant noted an exception (R. 18).

The defendant then filed six pleas, as follows: 1. Not indebted. 2. Did not promise. 3. That Trainor did not apply to defendant to change the beneficiary to the executors of his last will; yet, if he did, that the application was not made in accordance with the rules, regulations and laws governing such applications. 4. That the defendant did not, through its subordinate officer, tell Joseph Trainor that the beneficiary must be a dependent member of his own family, and if said officer gave Trainor such information, it was not at the request, direction, or with the knowledge of the defendant, and that said officer had no right or authority, either officially or personally, to do so. 5. That the said Trainor did not direct, while living, that the fund should be paid to the plaintiffs, and that their names are not contained in the benefit certificate. 6. That under the by-laws there was due from Trainor to the defendant, on November 1, 1902, an assessment for $3.30, payable without notice before midnight of November 30, 1902, and that said assessment was not paid, and the said Trainor thereby became, under the by-laws, at midnight, November 30, 1902, disconnected from the defendant, and remained so disconnected up to the time of his death, December 2, 1902, and that all claims against the defendant became thereby forfeited (R. 19, 20).

Issue was joined upon these pleas (R. 21, 22), and after trial the Court instructed the jury that the main fact to be submitted to them was whether or not the local order had so acted that the members could rely upon another months leniency in regard to the payment of dues without any forfeiture of their rights as members; and if they should find

it was the practice of the local order to give another thirty days in which to make the payment, and that was all they had to do, then members might be entitled to rest upon that. If they should so find, and further find that (1) Joseph Trainor in his lifetime designated the plaintiffs as the beneficiaries, under his benefit certificate, by a letter, wherein said fund is specially designated and ordered to be distributed; (2) that the personal representatives of Catherine Trainor, wife, assigned their interest to the said plaintiffs; (3) that there was a custom of the defendant to give an additional thirty days to pay their assessments; (4) and that within the said thirty days extension the assessments of the insured were tendered, then they should find for the plaintiffs in the sum of $1,993.40, with interest (R. 37-39), which the jury accordingly did; and the defendant brings the case to this Court for review upon exceptions taken at the trial.

ASSIGNMENT OF ERROR.

It is respectfully submitted that the Court erred as follows:

1. In overruling defendant's demurrer (R. 18).

2. In admitting in evidence the benefit certificate (R. 25).

3. In admitting in evidence the written and oral declarations of W. S. Stetson (R. 26, 27).

4. In admitting in evidence Joseph Trainor's private letter of instructions to his executors (R. 27).

5. In admitting in evidence the tender of assessments after the death of Joseph Trainor (R. 27).

6. In admitting in evidence the written application for reinstatement of the executors made after the death of Joseph Trainor (R. 28).

7. In admitting in evidence the alleged application of Joseph Trainor for change of beneficiary (R. 31).

8. In refusing to grant defendant's prayer to direct a verdict for defendant (R. 37).

9. In refusing to grant the 2, 3, 4 and 5 prayers of the defendant (R. 37).

10. In granting the plaintiffs' first prayer (R. 37).

11. In refusing to instruct the jury, as requested by counsel for defendant (R. 38, 39).

First Error.

It may be well to show at the outset that plaintiffs cannot recover at law in any capacity in which they sue. Suit is brought in three capacities, viz.: (1) As assignees of the executor of Catherine Trainor, wife of insured; (2) as assignees of the heirs at law and next of kin of Catherine Trainor; (3) as executors of Joseph Trainor (R. 2).

(1 and 2) *Plaintiffs Cannot Recover as Assignees.*

Catherine Trainor, who predeceased the insured (R. 4), had no vested right or interest in this fund by reason of her designation as the beneficiary, and it follows that her personal representatives upon her death acquired none. This question has been settled by this Court in the case of (1894) Berkeley *vs.* Harper, 3 App. D. C., 308, where the Court, in construing this defendant's constitution and by-laws, said:

> "It is now settled in this class of cases that the beneficiary nominated in the beneficiary certificate has no vested right or interest in the benefit contemplated by such certificate, simply by being designated therein as the beneficiary; for the member may, at any time before the contract matures, substitute another person or class of persons as beneficiaries, unless restrained by the constitution and by-laws of the association. Even in the case where the beneficiary named in the certifi-

cate dies before the member, the representatives of such beneficiary have no interest in the benefit, though the member dies without making another nomination."

(1895) Moss *vs.* Littleton, 6 App. D. C., 201.
(1882) Masonic Mut. Relief *vs.* McAuley, 2 Mackey, 70.

(3) *Plaintiffs Cannot Recover as Executors.*

The declaration alleges that the defendant's charter, among other objects, sets forth to "establish a benefit fund from which a sum not to exceed $2,000 shall be paid at the death of each member to his or her family, or to be disposed of as he or she may direct" (R. 3), and that the defendant was authorized to issue benefit certificates to its members payable at death "as he or she may have directed while living, and as contained in the benefit certificate" (R. 2). So that under plaintiffs' declaration this fund is payable to one of two classes of persons, viz.: first, to the member's family; or, second, to whomever the insured "may have directed while living, and as is contained in the benefit certificate." It follows, therefore, that payment wrongfully to one class would render the defendant liable to suit by the other.

But there is no allegation whatever that Joseph Trainor had no family or that plaintiffs are the members of Joseph Trainor's family. Consequently plaintiffs, in order to recover, must bring themselves within the description of the other class, viz., those to whom Joseph Trainor directed the fund to be paid "while living, and as is contained in the benefit certificate."

The Insured Did Not Direct While Living.

There is no allegation in the declaration that Joseph Trainor ever "directed while living" that the fund should

be paid to the plaintiffs. This is one of the essentials of recovery, as the formalities for designation and change of beneficiary are required by the by-laws (R. 29). The declaration does not allege that the application for change of beneficiary was made in accordance therewith. The change may legally have been denied because the application failed to comply with the by-laws. This is a material allegation, and the declaration should contain sufficient averment for the Court to see that plaintiffs have a right of action.

The rule is well established by a long line of authorities that the formalities required by the charter and by-laws of a benevolent society relative to the *designation of beneficiary* are part of the contract, and must be strictly complied with, and in default of such designation the society is not bound to pay to anyone.

Bacon on Benefit Soc., 239.

A mere power of appointment, which is not exercised prior to the death of the beneficiary *in the manner specified*, becomes inoperative, and the company or association is not bound to pay to anyone.

(1875) Maryland Benev. Soc. *vs.* Clendinen, 44 Md. 429.

The authorities all agree that in making a *designation or change of a beneficiary* under a benefit certificate, that the laws of the order must be strictly complied with, and unless all formalities are observed that the designation or change is not binding on the association.

(1887) Holland *vs.* Taylor, 111 Ind., 121, 7.
(1890) Supreme Conclave *vs.* Cappella, 41 Fed. Rep., 1.

Plaintiffs' Names Not Contained in the Benefit Certificate.

Before the Court can say that the declaration is not demurrable, it must appear that the plaintiffs' name was contained in the benefit certificate. This allegation is absolutely essential, because the laws of the defendant required the name of the beneficiary to be written in the certificate. This was a part of the contract between the parties, and was a requirement made for the protection of the defendant. In a case where this question arose the Court said:

> "It was perfectly competent for the parties to contract as they did, and the mode of executing the reserved power provided in the contract cannot be regarded as an idle ceremony, because substantially a new contract was made upon its being complied with, and thereby all doubts upon the part of the association as to who was the beneficiary was removed."

(1884) Stephenson *vs.* Stephenson, 64 Iowa, 534.
(1889) Hainer *vs.* Legion of Honor, 78 Iowa, 245.
(1890) Jinks *vs.* Banner Lodge, 139 Pa. St., 414.

The form for the designation of the person to whom the holder might direct the policy to be paid was evidently prescribed by the company for its own protection, that upon the death of the holder, there might be no question as to the person to whom it was to be paid, and not leave it to the uncertainty of parol evidence. Held, as the form of designation was prescribed, and was not complied with, that there could be no recovery by the administrator.

(1886) Elliott *vs.* Whedbee, 94 N. C., 115-120.

The by-laws of an association provided: "When a member dies, the association shall pay within sixty days to his direction, as entered upon his certificate of membership, the sum of $2,000." The insured died, and the name of no

person was entered on the record book of the association or on the certificate showing to whom the benefit should be paid. Suit was brought by the administrator. The Court held there could be no recovery, as the association promised to pay to no one except such person as the insured should direct by entry upon the certificate or record book. The presumption is that he intended not to do what he omitted to do.

(1883) Eastman *vs.* Association, 62 N. H., 555, 556.

The by-laws of an association provided that the insurance should be paid to the wife and children, and, if none, to such person as the insured may have formally designated to his lodge prior to his death. The member, having no wife and children, designated his mother, who predeceased him, and no other designation was made in the manner prescribed. Held, that the member had simply a power of appointment, which, if not exercised prior to his death, *in the manner prescribed,* became inoperative, and as the beneficiary died before the member, and as no other designation was made as prescribed, the defendant was not compelled to pay to anyone.

(1884) Hellenberg *vs.* District, 94 N. Y., 580.

Plaintiffs' Remedy in Equity, Not at Law.

The plaintiffs do not deny that the by-laws require that the beneficiary shall be named in the certificate, but bring their suit upon the theory that an application for a change of beneficiary having been refused and the designation having been made in a way different from that provided by the by-laws, that this imperfect change can be recognized in a court of law and the new beneficiary recognized as a party to the contract. But the plaintiffs have misconceived their

rights. If they have any, they can only be enforecd in a court of equity. Mr. Justice Brown, in the case of (1890) Supreme Conclave *vs.* Cappella, 41 Fed. R. 4, discussing the question of change of beneficiary, said:

> "There are, however, three exceptions to this general rule, requiring an exact conformity with the regulation of the association: * * * (2) If it be beyond the power of the insured to comply literally with the regulations, a *court of equity* will treat the change as having been legally made. Thus in the case of Grand Lodge *vs.* Child, 70 Mich., 163, the insured made his betrothed the beneficiary, and subsequently lost his certificate. His beneficiary having married another, he made a statement of the loss, and applied for a reissue of the certificate, making his son the beneficiary. His application was refused. * * * It was held that such acts constituted an equitable change of beneficiary, and that the son was entitled to the fund. The Court held that the insured had done all that he could do, and all that he was required in equity to do, to change the donee of the certificate."

(1892) Grand Lodge *vs.* Noll, 90 Mich., 37.
(1902) Penn. Railway *vs.* Wolfe, 203 Pa. St., 269.

Second Error.

The objection to the admission of the benefit certificate was well taken, because there was a material variance between the certificate declared on and the one offered in evidence (R. 25). The certificate offered in evidence differed from the one declared on in two material particulars, viz.: (1) It contained an alleged application for change of beneficiary; (2) it showed on its face that it was a "duplicate." This latter mark is attempted to be explained by a self-serving written declaration of the insured to the effect that it is not a "duplicate," but the original, the explanation also not

appearing on the certificate declared on. These discrepancies were of a material character, and operated to mislead the defendant.

(1897) W. & G. R. R. Co. *vs.* Grant, 11 App. D. C., 107.

The defendant called for the original certificate, and it should have been produced or satisfactorily accounted for before secondary evidence was competent.

Third Error.

An exception was taken to the admission of certain oral declarations by (R. 26), and a letter of, W. S. Stetson (R. 25, 26), on the ground of irrelevancy, want of proof that Stetson had authority to bind the defendant by such admissions, and because Stetson was then dead, and admissions or declarations made by him as agent of defendant were inadmissible under Section 1064 of the Code. This testimony was offered in support of the allegation in the declaration (R. 4) that Trainor had "applied to the defendant to change the beneficiary to the executor named in his last will and testament, naming his then contemplated executor; which change the defendant refused to make, and thereupon, through its subordinate officer, W. S. Stetson, * * * told the said Joseph Trainor that the beneficiary must be a dependent member of his own family."

1. *Not Admissible Under Code.*

The Code of the District of Columbia provides:

"Sec. 1064. If one of the original parties to a transaction or contract has, since the date thereof, died or become insane or otherwise incapable of testifying in relation thereto, the other party thereto shall not be al-

> lowed to testify as to any transaction with or declaration or admission of the said deceased or otherwise incapable party in any action between said other party or any person claiming under him and the executors, administrators, trustees, heirs, devisees, assignees, committee, or other person legally representing the deceased or otherwise incapable party, unless he be first called upon to testify in relation to said transaction or declaration or admission by the other party, or the opposite party first testify in relation to the same, or unless the transaction or contract was made or had with an agent of the said deceased or otherwise incapable party, and said agent testifies in relation thereto, or unless called to testify thereto by the Court."

The purpose of this statute is to place two parties to a transaction upon terms of equality in reference to testimony so that where one party to the transaction is dead and not able to give his version of the affair and explain his acts, the survivor is prohibited from testifying as to his version of the transaction. This is done to guard against false testimony. It extends to transactions by and with corporations, who can only speak through its officers and agents, and if the transaction was had with an agent of a corporation, who has since died, then the survivor comes within the terms of exclusion.

A bill was filed against a corporation to have an absolute deed declared a mortgage. The testimony offered was of a conversation between the complainant and an officer of the corporation, since deceased. Held, that such evidence was inadmissible. The Court said that the officer having acted in this matter as a fiduciary representative of the corporation, the testimony of the complainant offered to prove conversations and transactions with the officer could not be admitted.

(1890) Downing *vs.* Woodstock Co., 93 Ala. 262, 5.

A bill was filed to show that an unrecorded mortgage was withheld from record by an agreement between the mortgagor and the cashier of a bank, then dead. This testimony was admitted, but was held error. The Court said:

> "We have often said, that the purpose and policy of the statutes are, to exclude the living from testifying against the dead, because the latter cannot be heard in contradiction. A contrary rule would open broad the door to the entry of innumerable frauds. That a party to a suit is, under the statute, incompetent to testify as to a transaction with, or a statement made by a deceased *agent* of another party to the record in the same suit, has several times been expressly decided by this Court, and that is this precise case."

(1888) Mobile Savings Bank *vs.* McDonnell, 87 Ala. 736, 4.

A county sued a tax collector for money collected and not paid over. The collector defended, stating that he had turned over all money collected to the county treasurer, then dead. The Court said:

> "The witness is incompetent. The agent, who acted for the county, and alone represented the county in the cause of action, to wit, the payment of money to the county is the Couny Treasurer. He was dead, and the mouth of the County was sealed touching what passed between it and its tax collector, when the mouth of its Treasurer was sealed in death. This Court has repeatedly held that, when the agent of the corporation, acting for it in any transaction, is dead, the other party to that transaction cannot be heard to testify about it unless, at all events, he would have been a good witness before the act allowing parties to testify. The tax collector is the party in interest, and in the case at bar, his testimony would win the case for him; the County is the other party; it is dead—still as death—touching this

issue of payment to its Treasurer, when that Treasurer died. So that, as well as the law, the reason and spirit of the law, closes the living mouth that can never be confronted with the voice of the dead."

(1885) Langford *vs.* Commissioners, 75 Ga. 502, 3.

Ejectment was brought by party purchasing property at trustees' sale. The defendant contended that the note secured by the trust had been paid before sale by an agreement with Sharp, an agent of the corporation, who afterwards died. The Court said:

"Further objection was made to the defendant testifying as to conversations had with Sharp, on the ground that Sharp, according to the testimony of the defendant, was the *contracting agent* of the corporation, and that he being dead, the defendant was not a competent witness as to any admissions, declarations, or contracts he may have made. According to the rule laid down by Wharton, this point was valid. That writer says: 'Under statutes which exclude the surviving party to a contract, the death of a contracting agent excludes the surviving party who contracted with him.' 1 Wharton Ev., Sec. 469. * * * The object of the statute is to guard against false testimony by the survivor, and in order to do this, it establishes a rule of mutuality by which, when the lips of one contracting party are closed by death, the lips of the other party are closed by law. And this principle remains unaltered as well where the contracting agent of a corporation dies, as where the contracting agent of a firm dies, and the dangers and the mischiefs of any other rule would be as great in the former as in the latter case. A corporation can only speak and act through agents; the agent represents the corporation, and if, after the death of an agent of a corporation, it were admissible for a party to come in and testify to a contract made with such deceased agent, testify to facts unknown to the corpora-

> tion or any of its other agents, it is easy to see that corporations would be without protection where others, in like circumstances, are fully protected."

(1887) Williams *vs.* Edwards, 94 Mo. 447, 51.

(2) *No Proof of Stetson's Authority.*

The plaintiffs, after proving that Stetson was Keeper of Records at the time the letter purports to have been written, and that the letter was in Stetson's handwriting, offered the letter in evidence without showing or offering to show what was the "letter of the 10th instant" to which this letter was a reply; what were the duties of the Keeper of Records, and whether or not Stetson in his official capacity had authority to make such declarations. The record does not show whether the oral declarations were made by Stetson as an officer of the defendant and in his line of duty, or were made in a mere casual conversation. But the record does show that both the letter and the oral declaration were narratives of a past transaction. The declarations of an officer of a corporation are not admissible merely because he sustains an official relation. Before they are competent, it must be shown that he was at the time acting in the capacity of an agent, with authority to bind the corporation, in the line of his duty, and the declaration must be a part of the *res gestae*.

Evidence was offered to show that the defendant had certain transactions with Sharp, who was admitted to be authorized to solicit insurance for the company, by which defendant was to surrender his policy in full satisfaction of a deed of trust. The Court said:

> "Objection was taken to the defendant testifying as to conversations had with Sharp, on the ground that it was not shown as a preliminary step to the admission

of his conversations, declarations and agreements, that he had any authority to bind the company in regard to the matter detailed in the testimony of the defendant. As there was no such foundation laid of agency or authority on the part of Sharp, this objection was well taken. 1 Greenleaf on Ev., Sec. 114."

(1887) Williams *vs.* Edwards, 94 Mo. 447-51.

An act done by an agent cannot be varied, qualified or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an act done, at a later period.

(1874) Packet Co. *vs.* Clough, 20 Wallace, 528-40.

Admissions or declarations of an agent to others, after a sale, as to the character of the sale are only recitals of the details or circumstances of a past occurrence, and are not proof of the existence of the occurrence. They constitute, in their essence, hearsay evidence.

(1885) Winchester Co. *vs.* Creary, 116, U. S. 161.

Declarations or admissions by an agent, of his own authority, and not accompanying the making of a contract, or the doing of an act, in behalf of his principal, nor made at the time he is engaged in the transaction to which they refer, are not binding on his principal, and are not admissible in evidence.

(1839) Franklin Bank *vs.* Steam Nav. Co., 11 G. & J., 28, 34.

In a suit upon a policy of insurance the defendant claimed that proof of death was not given as required. Plaintiff offered evidence tending to show that the agent refused to

furnish blanks or receive proof of death, claiming policy had lapsed because of non-payment and that proofs were sent to the home office by mail. To prove receipt, plaintiff offered evidence of declarations of general agent admitting their receipt. This testimony was received over objection. Held error; that the admission was not connected with any act of the agent as such, but for aught that appeared was a casual statement made by him, when not in the performance of any service or duty for his principal, and so was incompetent.

(1875) Dean *vs.* Aetna Life Ins. Co., 62 N. Y., 642.

It is a well established rule that the declarations of an agent made at the time of the particular transaction which is the subject of inquiry, and while acting within the scope of his authority, may be given in evidence against his principal. It is equally well settled that the declarations of an agent, made after the transaction is fully completed and ended, are not admissible.

(1876) Huntingdon R. R. Co. *vs.* Decker, 82 Pa. St. 119, 23.

Information furnished a witness by an agent of a railway company as to the contents of a record kept by the company when it appears that the information given related to transactions long past, and it does not appear that the furnishing of such information was within the scope of the agent's employment, is inadmissible.

(1892) Hematite Mining Co. *vs.* East Tenn. R. R. 92 Ga. 268.

Declarations of an agent are admissible only because treated as the declarations of his principal, and the latter is

bound by them only while the former is acting within the scope of his duties for which he was employed.

(1883) Phelps *vs.* R. R., 60 Md. 536, 49.

Conversations between the plaintiff and the treasurer of the defendant were inadmissible because the treasurer had no authority to bind the defendant and the conversations were not in the line of the treasurer's duty. They were simply desultory conversations and were no part of the *res gestae.*

(1892) Hay *vs.* Platt, 21 N. Y., Supp. 362, 4.

An engineer shortly after an accident stated that his train at time the plaintiff was injured was running at the rate of eighteen miles an hour. Held incompetent, because his declaration, when he was not performing his duties of engineer, was not explanatory of anything in which he was then engaged. It did not accompany the act. It was, in its essence, the mere narration of a past occurrence, not a part of the *res gestae,* simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted.

(1886) Vicksburg R. R. *vs.* O'Brien, 119 U. S. 99, 105.
(1874) Packet Co. *vs.* Clough, 20 Wallace, 540.
1 Greenleaf on Evidence, Sec. 113.

The surety on a note sent his agent after pay day to inquire of the bank whether the note had been paid. The cashier said the note had been paid. In a suit by the bank against the surety the Court held, that the declarations of

the cashier, giving information as to past transactions of the bank, though pertaining to his own department of the business of the bank, are not receivable as evidence against the bank.

(1853) Franklin Bank *vs.* Steward, 37 Me. 519.

(3) *Declarations Not Proof of Facts.*

But even if this testimony is admissible, it does not establish the fact that any such application was made and that it was refused for the following reasons, viz:

(*a*) The declarations indicate that the application and refusal were in writing, which is not produced or accounted for.

(*b*) The last paragraph of the letter (R. 26) is "You have, perhaps, *learned* from Mr. Trainor," etc.

(*c*) The oral declaration is that Mr. Trainor applied "to change the benefit certificate," while the allegation it is offered to support is that he applied to change "the beneficiary to the executor named in his last will and testament."

(*d*) The declarations are hearsay and mere narratives of a past event.

Fourth Error.

An exception was noted to the admission by the Court of the private letter of instruction from Joseph Trainor to the plaintiffs, his executors, on the ground of immateriality, as this letter purports to be of a private nature, and further because there was no testimony that it was ever brought to the attention of the defendant or that the defendant had any knowledge of its existence (R. 27). This letter is not material to any issue in this case for it merely purports to

instruct the executors how they shall dispense a fund received by them under a contract between Joseph Trainor and the heirs of Catherine Trainor. It contains no direction to the defendant to pay the money to Catherine Trainor's heirs, the insured's executors, or to any other person.

No Such Contract in Evidence.

But there is one element lacking to make this testimony admissible under any circumstances and it forms a link in the chain of plaintiffs' case. They failed to produce at the trial and offer in evidence, if there is any such agreement, the contract between Trainor and his heirs referred to in this letter. So far as the record goes, there is no proof that any such contract ever existed. It may be that Joseph Trainor contemplated making such an arrangement with the heirs of Catherine Trainor, but that he purposely, for some reason sufficient to himself, refrained from doing so. The presumption of law is that he intended to leave undone what he failed to do, viz: to make a proper change of beneficiary.

Not Brought to Defendant's Notice.

If it were intended to bind the defendant to pay the money in accordance with the contract and this letter, then testimony showing that they were brought to the defendant's notice by Joseph Trainor before his death should have been produced and that both parties acquiesced in the same. This document would not be sufficient to bind the defendant because it shows it was of a private nature, and it is not the method of designation of a beneficiary prescribed by the by-laws. In other words, there is nothing in the record to show that the defendant was ever directed to pay this fund to any one, except Catherine Trainor.

Fifth Error.

The plaintiffs offered evidence to show that on December 19, 1902, that they, as personal representatives and as executors of Joseph Trainor, tendered to the defendant the November and December assessments, to which objection was made on the ground that it was immaterial and irrelevant because said tender was made after the death of the insured (R. 27). This exception raises two serious questions in this case, viz: First. Is the contract between insurer and insured terminated upon failure to pay assessments where the by-laws provide for immediate disconnection upon such failure. Second. Where by-laws provide for reinstatement after disconnection, is the privilege of reinstatement personal or does it survive to the personal representatives.

Failure to Pay Assessments Terminates Contract.

The undisputed facts in this case are that Joseph Trainor died December 2, 1902, without having paid his November and December assessments (R. 30, 32, 35). The appellant insists that as the by-laws are a part of the contract between the insurer and insured (14 App. D. C. 154 and 13 App. D. C. 245) and they provide for disconnection and forfeiture upon failure to pay assessments that there is no right of action against it. The by-laws on this point are as follows:

> "A member who fails to pay this monthly assessment before midnight of the last day of the month in which it becomes due and payable, shall *ipso facto* stand disconnected from his commandery and from the order, without sentence by the commandery" (R. 30).
>
> "The disconnection or expulsion of any member shall work an immediate forfeiture of all claims of said disconnected or expelled member and of the beneficiary under his benefit certificate to any participation in the benefit fund." (R. 30).

The benefit certificate on which his suit is brought contains a provision as follows:

> "That the suspension, disconnection or expulsion of said member shall work an immediate forfeiture of all claims of said member on the benefit fund of this order, and also the forfeiture of the claims of the beneficiaries named in this certificate." (R. 3).

If, by the laws of the society, non-payment of an assessment operates as a forfeiture, the member must elect, every time he is called upon to pay an assessment, either to pay within the stipulated time, or suffer the penalty of loss of membership and its benefits by neglecting or refusing to pay within that time.

Bacon on Benefit Soc., Sec. 385.
(1903) Grand Lodge *vs.* Marshall, 31, Ind. App. 534.
(1887) Rood *vs.* Railway Asso., 31 Fed. Rep. 62.
(1888) Bosworth *vs.* West. Mut. Aid, 75 Iowa 582.
(1891) Maginnis *vs.* Aid Asso., 43 La. Ann. 1136.

Where the by-laws of an association provided that if any member should neglect to pay any dues or assessments, "in such case such membership shall cease and determine at once without notice and all claims be forfeited to the association," it was held that neglect to pay the assessment *ipso facto* determined the membership of the delinquent.

(1883) McDonald *vs.* Mut. Benefit Asso., 29 Hun. 87.
(1903) Smith *vs.* Sov. Camp, 179 Mo. 119.

The application, certificate of membership, and by-laws form the contract. The provisions of the contract make the forfeiture a part of the contract, and a failure to pay within

the time limited causes the forfeiture, and the contract is self-executing in creating the forfeiture.

(1898) Lehman vs. Clark, 174 Ill. 279.
(1900) National Union *vs.* Shipley, 92 Ill. App. 355.

Where the suspension attaches by operation of law upon an event named, and the member dies before the suspension is set aside, in conformity with the rules of the order, there can be no recovery upon the benefit certificate.

(1886) Borgraefe *vs.* Knights of Honor, 22 Mo. App. 127, 142.
(1887) Mason's Benevolent Soc. *vs.* Baldwin, 86 Ill. 479.
(1883) Madeira vs. Mut. Ben. Soc., 16 Fed. Rep. 749.
(1880) Dolan *vs.* Good Samaritan, 129 Mass. 437.
(1884) Karcher *vs.* Sup. Lodge, 137 Mass. 368.
(1882) Supreme Com. *vs.* Ainsworth, 71 Ala. 436.

The by-laws provided "that members should forfeit their membership if they failed to pay their dues within thirty days after publication of an assessment." It appeared that the insured had failed to pay in the time specified and it remained unpaid at the time of his death. Held, that he had forfeited his membership, and there could be no recovery on his certificate.

(1883) Madeira *vs.* Mut. Ben. Soc., 16 Fed. Rep. 749.

Privilege of Reinstatement Personal to Member.

The Court below substantially instructed the jury that as the insured had a right under the by-laws to reinstate

himself within thirty days by payment of assessments in arrears, that such right would accrue to his personal representatives, and upon tender by them of past assessments, that Joseph Trainor, though dead, was reinstated. The Court refused an instruction offered by the defendant that the right of reinstatement does not accrue to the insured's personal representative and that tender of assessments by him would not entitle the beneficiary to recover (R. 37).

The by-laws contain the following provision:

> "*Persons who have been members of the order*, but are disconnected for the non-payment of dues or assessments, *desiring again to obtain membership*, can do so within thirty days after their disconnection on payment of the arrearages for which they were disconnected, and such fine as the commandery may by by-laws provide." (R. 29).

According to the very terms of the contract the privilege of reinstatement is limited to "persons who have been members of the order," and is not extended to their representatives. But the authorities have considered this point.

Where a member of a beneficial association is suspended for non-payment of assessments and neglects during his lifetime to secure his reinstatement in accordance with the terms of his benefit certificate and the provisions of the laws of the association, his restoration to membership cannot be affected after his death by the payment of the sum due from him to the association at the time of his death, though the period within which, if alive, he could have secured his reinstatement has not yet expired.

Beach on Insurance, Sec. 148.

Mr. Chief Justice Alvey, in the case of (1885) Yoe *vs.* Howard Benevolent Asso., 63 Maryland 86, passed on this

question. In that case the by-laws provided that "within thirty days from date of notice, assessments shall be due and in case a member fails to pay the same he shall forfeit all claims upon the association; yet any member may be reinstated by giving such excuse himself or through his representative for such failure as may be satisfactory to the Board. Here the by-laws provided in terms that his "representative" should give an excuse. A notice of assessment was sent August 29, payable in thirty days; two days after the expiration of the thirty days, the member died without having paid this assessment. The Court said:

> "*The obligation to pay the death assessment is personal to the member and it must, according to the laws of the article referred to, be paid in his lifetime, for if he died before payment, no representative of his is authorized to pay for him, in order to entitle the intended beneficiary to receive the mortuary aid from the association.* The payment is to be made by the member as such, and in case of his default he ceases to be a member, and he forfeits all claim upon the association. The member failing in his lifetime to make payment, and the thirty days having expired before his death, and no one being authorized to make it after his death, to hold the association liable, notwithstanding no payment of the assessment has been made, would be to disregard the mutuality of members, as well as do violence to the terms and plain intent of the article of the association which we have quoted. The thirty days grace was for his convenience and accommodation, and though he had the full period of thirty days within which he could make the payment, yet if he thought proper to delay it to the last hour of that period, the delay was at his own risk, and not that of the association. Here the full thirty days had expired without payment, and the party died two days thereafter and that being the case, he was not a member when he died, having by his default lost his membership and all the benefits appertaining thereto."

(1905) Delaney vs. Kelly, 92 N. Y. Supp. 1021.

Three Cases Directly in Point.

In the three following cases where suits were brought against beneficial orders, the facts were almost identical with the facts in the case at bar. The plaintiffs in these cases assumed the same position now contended for by the appellees. All are well considered and seem to apply both the rules of justice and reason. If followed they will determine this case.

A. The by-laws provided that on proof of death, each member should in ten days pay an assessment, and upon failure, such member should be suspended, and in case of his death before reinstatement the holder of the certificate should be without right against the association; but upon payment of the assessment in thirty days after suspension, the suspension should cease. A member died June 6, and a payment was due on or before June 17. The insured died July 4, without paying the assessment or reinstating himself, and *ten days after his death and within the thirty days his executor tendered the amount due.* Held, that where dues, assessments, suspension and reinstatement are governed by its laws, each member is bound to comply with the obligation he assumes. When a charter contains an article suspending a member for the non-payment of an assessment, *it is conclusive and binding.* This regulation of the defendant is self-operative, and takes effect after notice, unless it is estopped or has waived the suspension. On the 4th of July the member had not complied—at the time of his death. Some ten days afterwards the executor of his estate offered to pay the amount. It was an agreement in due form, binding on all members, *that in case of death during suspension the right to recover on a certificate was lost.* That the Court was only enforcing a condition the members had made a law with themselves. The suspension and notice

was complete before death and nothing in the nature of a waiver to avoid the effect of the suspension is shown.

(1891) Maginnis *vs.* Aid Asso., 43 La. Ann. 1136.

B. The insured under the by-laws was bound to pay his assessment on the last day of the month under penalty of suspension from membership and all benefits under his certificate, with provision that payment of all assessments in sixty days after suspension would reinstate the defaulting member. The insured failed to pay his November assessment on the last day of that month and so from that date under the by-laws he stood suspended. He died January 4, within the sixty days, without having been reinstated. He had on four prior occasions been suspended for non-payment of assessments, but had been reinstated in sixty days by payment of past due assessments. The beneficiary under the certificate on January 24, tendered all assessments due to the association, but they were refused on the ground that "the insured was then dead, and that a dead man could not be reinstated." The beneficiary contended that an agreement that a contract shall be void in default of payment at a given time attended by a further agreement that the rights of a party thereto may be saved by payment within sixty days thereafter, is repugnant to and inconsistent with the idea of forfeiture before the sixty days, and as no forfeiture could have been declared, until after the expiration of that time, and as the insured died within the sixty days, *that his right of reinstatement passed to his legal representative.* The Court said that such societies have no practical means of meeting their frequently recurring obligations except by prompt collections of assessments, and it has been found necessary to adopt stringent means to enforce their prompt

payment. Forfeitures are not favored in law, but they will be enforced for a breach of the condition agreed upon, when such condition is clearly set out, and the intention of the parties is manifest. The forfeiture took place *eo instanti,* by operation of law. By payment of arrears in sixty days he could defeat the forfeiture. This was an option of which *he might avail himself.* Could his beneficiary avail herself of this privilege within that time? Bacon on Benefit Societies, Sec. 385b, says: 'If a member neglects to become reinstated during his lifetime, he cannot be reinstated after his death, though the period within which he might be reinstated if living has not expired.' Niblack on Benefit Societies, Sec. 292, says: 'When a member has been suspended for non-payment of an assessment and he had neglected during his lifetime to secure his reinstatement in accordance with the terms of his certificate by paying arrearages while in good health and within a certain time, his restoration to membership cannot be effected after his death by payment by another person, within the time limited, of the sum due from him at the time of his death.' We have quoted from Bacon and Niblack because we regard their statements as being founded in elementary principle. Held that the beneficiary could not recover.

(1896) Carlson *vs.* Supreme Council, 115 Calif. 466.

C. The by-laws provided that each member should pay an assessment on or before the last day of each month, and in case of default, he should stand suspended and not entitled to benefits until he had been reinstated, which could be done on payment of assessments within thirty days after suspension. The insured died March 10th, having been in default since March 1. The beneficiary tendered payment

March 25. The insured had theretofore defaulted, but had been reinstated. The beneficiaries contended that the acceptance of assessments from the insured after they became due is sufficient to estop the association from declaring a forfeiture for non-payment of assessments that became due on the last day of February. The Court said this identical question was determined adversely to such a position in the case of Modern Woodmen of America *vs.* Tevis, 117 Fed. Rep. 369, which case followed Northern Assurance Co. *vs.* Building Asso., 183 U. S. 308. That the law declared in those cases is based upon correct principle and is decisive of the controversy here. A contrary rule—the one for which appellees contend—would undermine all fraternal and beneficial societies of this character, and be subversive of their dominant and leading objects and purposes. In fraternal insurance companies assessments are made for the purpose of paying death losses of members who have died *in good standing,* and without the payment of these assessments there could be no death fund. The association and the member have reciprocal obligations, the one depending on the other, and in order to have the contemplated benefit, they must both comply with the constitution and laws of the order. Under the contract and laws of the order the insured was not in "good standing" when he died. That condition was not caused by any fault of appellant, but was the direct fault of his own laches. He and his beneficiaries were bound to know his and their rights, for they were fixed by the laws of the association, and such laws were a part of the contract of insurance. That the failure to pay an assessment when due was an infraction of the contract and worked a suspension of the insured, who died before he was reinstated and while in default. If it could be said that the beneficiary was his agent to pay his assessments, such

agency was revoked by his death. *That payment by the beneficiary after death could not vitalize the forfeited contract or work a reinstatement of the insured.*

(1904) Supreme Lodge *vs.* Jones (Ind. App.) 69 N. E. 718.

Sixth Error.

An exception was taken to the admission of the written application of Fannie Bernard and J. Marion Duncan, heirs of Catherine Trainor, Alfred D. Bernard, her executor, and Richard Bernard & Son, attorneys, dated December 19, 1902, for reinstatement of Joseph Trainor on the ground of its immateriality, because it was made after the death of the insured. This evidence should have been excluded for the following reasons:

(*a*) The by-laws do not provide for reinstatement of members upon the application of other persons.

(*b*) There is no authority under the by-laws for the reinstatement of a member after death.

Seventh Error.

An exception was noted to the admission of the application of Joseph Trainor to change the beneficiary on his benefit certificate to J. Marion Duncan, the executor of his last will, on the ground that said application did not conform to the requirements of the by-laws governing such change. There is nothing in the record to show that this application was ever presented by anyone to the defendant or that it ever refused to comply with the request or that it even acted upon the same. Nor is there any proof offered to show that J. Marion Duncan was the executor or the contemplated executor under the last will of Joseph Trainor. But if this ap-

plication had been presented to the defendant, it bears sufficient reasons on its face for refusal, because it does not comply with the requirement for change of beneficiary provided in the by-laws. The by-laws (R. 29) relating to change of beneficiary provide as follows:

> "Sec. 2. Applicants shall enter upon the application blank the name or names and relationship or dependence of the members of their family, or those dependent upon them, to whom they desire their benefit paid, and the same shall be entered in the benefit certificate by the supreme keeper of records."

Applications for change of benefit certificate must be signed by the applicant, and the name or names of beneficiaries must be given as provided in Section 2 for applicants for membership.

The object of this testimony is to show that application was made by Joseph Trainor for a change of beneficiary to said Duncan and was refused on the ground as alleged in the declaration "that the beneficiary must be a dependent member of his (the insured's) own family." This application does not conform to the requirements of the defendant's rules as to application for change of beneficiary; (1) it does not give the relationship of the beneficiary to the insured (that part having been erased by Trainor); (2) it does not give the dependence of the beneficiary upon the insured. This information the defendant considered material and should have been given literally on the blank as required by the defendant. The association has the right to insist on this. Mr. Justice Brown, of the Supreme Court, in passing on this question, said:

> "In making a change of beneficiary, however, the insured is bound to do it in the manner pointed out by the policy and the by-laws of the association, and any

material deviation from this course will invalidate the transfer. * * * So, if the by-laws fix definitely the manner of changing the beneficiary by his action during his life, an attempt to divest the benefit by will has usually been held to be abortive."

(1890) Supreme Conclave *vs.* Cappella, 41 Fed. Rep. 1.

Although the member of a benefit society is thus generally left free to revoke his designation of beneficiary and appoint a new one, he must do so in the way pointed out by the laws of the organization. It is but carrying out the rule laid down in regard to powers, that if a method of revocation of an appointment is created by the instrument conferring such power, this direction must be complied with. If the laws of the society prescribe certain formalities to be observed in the change of beneficiary, or if the assent of the society to a transfer is required, all the requirements must be obeyed.

Bacon on Benefit Soc., Sec. 307.

The same contract that permits the change fixed the mode and manner in which the change might be made, and we think that, taking the by-laws and the certificate, the mode and manner of changing the beneficiary was fixed as definitely, and was as binding upon the assured, as was the right to make such change binding upon the association and the beneficiary. In other words, under the contract, the assured had a right to change the beneficiary, provided he made the change in the manner provided in the contract.

(1887) Holland *vs.* Taylor, 111 Ind. 121, 7.

The manner in which the change of beneficiary should be made formed a part of the contract of insurance. Until the

contemplated change was made on the books of the association and a new certificate issued, the obligation to pay the beneficiary whose name appeared on the books of the association continued to exist.

(1884) Stephenson *vs.* Stephenson, 64 Iowa 534.
(1889) Hainer *vs.* Legion of Honor, 78 Iowa 245.
(1890) Jinks *vs.* Banner Lodge, 139 Pa. St. 414.

When the by-laws provide a method by which the beneficiary may be changed, that method must be pursued, and, when no change is thus made, the company's promise to pay runs only to the person named in the certificate.

(1898) Charch *vs.* Charch, 57 Ohio St. 561, 78.

Eighth Error.

The Court should have granted the defendant's prayer to instruct the jury upon all the evidence to return a verdict for the defendant, because there were no issues of fact in the case. They were all issues of law.

It is admitted in plaintiffs' declaration (R. 4) and by their own witnesses (R. 30, 32) that the November and December, 1902, assessments were not paid before Joseph Trainor's death and that he died December 2, 1902, disconnected.

It is admitted that Joseph Trainor had several times been disconnected for failure to pay assessments and had been reinstated (R. 36).

It is admitted that under the by-laws a member was given thirty days after disconnection to reinstate himself by the payment of arrearages.

It is admitted that the plaintiffs, after Joseph Trainor's death, tendered his arrearages within thirty days after his disconnection and they were refused.

The plaintiffs' witness, James S. Sharpe, testified that although he had been Treasurer for a number of years, he knew of no instance where the executors of a deceased member were ever permitted to pay the assessment within thirty days after disconnection (R. 32) or where the personal representatives were permitted to pay after death and after disconnection (R. 35). That he did not know whether he could recall a case where a payment was made for a man after *he was known to be dead.* While witness recalled one case where an assessment was tendered after a man's death, on cross-examination he admitted that the man died within the same month the assessment was due and was not disconnected at the time (R. 33).

Not in Good Standing at Death.

But there is another reason why the Court should have directed a verdict in favor of the defendant, viz: The insured was not in good standing at the time of his death. Under the terms of the certificate the defendant promised to pay on condition *"that said member is in good standing at the time of his death."* Good standing is a well defined *status* in benefit societies and where required by the by-laws it has been held to be a condition that must be established before liability of the society attaches. We are not without authorities to sustain this position.

Good standing, within the meaning of the order, implies a full and fair compliance with the laws in the payment of assessments. Therefore a member who is in arrears for assessments is not in good standing and his beneficiaries are not entitled to recover on his certificate.

(1884) McMurry *vs.* Supreme Lodge, 20 Fed. Rep. 107.

Bacon on Benefit Soc., Sec. 414.

A member is said to be in good standing when he complies with the laws, rules, usages and regulations of the order. Such compliance necessarily includes punctual payment of all assessments for which the member may become liable.

(1903) Royal Circle *vs.* Achterrath, 204 Ill., 549.

A benefit certificate contained this provision: "Provided the member is in good standing at time of his decease." The member had been suspended for failure to pay dues. Held, that the association was not liable on the certificate.

(1890) Brown *vs.* Grand Council, 81 Iowa, 400.

The by-laws provided that any member failing to pay his assessment in thirty days should stand suspended. An assessment was levied November 1, and insured died December 8, without paying the assessment. Held, that as the certificate was payable only in case member was in "good standing" at the time of his death, there could be no recovery.

Freckmann *vs.* Sup. Council, 96 Wis., 133.

A member of the order in arrears in assessments at time of his death, the time for collecting which has fully expired, is by reason of these facts not in "good standing" within the meaning of the benefit certificate requiring "good standing" at time of death to entitle the beneficiary to recover.

(1898) Puhr *vs.* Grand Lodge, 77 Mo. App., 47-63.

NINTH ERROR.

An exception was reserved to the refusal of the Court to grant certain prayers offered for the defendant (R. 37).

In the fifth instruction asked for, the Court's attention was called to the proposition that the right of reinstatement is personal to the member, and does not survive to the insured's personal representatives. This question has been considered fully under the fifth assignment of error.

Tenth Error.

The Court told the jury that the main fact to be submitted to them was whether or not the local order had so acted that the members could rely upon another months leniency without forfeiture of their right of membership. And if the jury should find that a member had in all fairness another thirty days in which to make payment, then the members might be entitled to rest upon that, and the defendant would waive the strict letter of the by-laws. And if the jury should so find, their verdict should be for the plaintiffs, provided they should further find (1) that Joseph Trainor designated the plaintiffs the beneficiaries by a letter of instructions offered in evidence; (2) that at the time of the death of Joseph Trainor there was a custom of the local commandery to give the member an additional thirty days in which to pay the assessment; (3) and that within said thirty days the assessments then due and payable were tendered to the defendant (R. 38). The Court erred in granting this instruction over objection of the defendant.

(1) The record does not contain a letter in which the plaintiffs were designated the beneficiaries. The letter offered by the plaintiffs in evidence (R. 5) does not designate the plaintiffs *beneficiaries,* but merely directs them to dispense a fund which the heirs of Catherine Trainor had agreed that Joseph Trainor should have the disposal of by letter. As has been shown heretofore, the heirs of Catherine Trainor had no interest in this fund. There is no testimony that this designation was ever brought to the atten-

tion of the defendant, or that it was ever acquiesced in by it. It is not the proper way to designate a beneficiary, as required in the by-laws. There was no evidence in the case from which the jury could find, even by inference, that the plaintiffs were designated beneficiaries. And as the defendant was not a party to this transaction, it could not be bound by its terms.

(2) This instruction was calculated to mislead the jury into thinking that there were occasions when the defendant had waived the strict letter of the by-laws and extended the time for payment of assessments. As a matter of fact, the record does not contain a single instance when the defendant transgressed its by-laws and gave such an extension, but, on the other hand, every extension was in conformity with the provisions of the by-laws. The Court said, in substance, that if the jury should find that such a custom existed, then they would be justified in finding that the insured had a right to rely upon that indulgence and to infer that such indulgence would be extended even in case of his death. The law and the facts do not warrant such instruction.

(3) The vice of this instruction is, that it gave the jury the impression that tender of unpaid assessments by the executors of the deceased insured would reinstate a dead man, although the by-laws provide otherwise.

Eleventh Error.

The Court should have granted the instruction asked for by the defendant, that the payment of an assessment in thirty days after disconnection could not be a waiver of the by-laws as to assessments (R. 39). But the Court directed the jury to determine whether or not the defendant disregarded the by-laws in its practice. There was no testimony that more than thirty days extension was ever given in any

case after disconnection, and this privilege was provided for in the by-laws, so that the record did not raise such an issue, and the facts did not warrant submitting such a question to the jury. The by-laws provide in case of default for re-instatement in thirty days by payment of all assessments (R. 29), and the acceptance of assessments by the proper officer was in compliance with the provisions of the by-laws, and not a waiver of them.

Smith *vs.* Woodmen, 179 Mo., 135.

It is respectfully submitted that the judgment should be set aside and a new trial granted.

ANDREW WILSON,
NOEL W. BARKSDALE,
Attorneys for Appellant.

Court of Appeals, District of Columbia

OCTOBER TERM, 1905.

No. 1544.

THE SUPREME COMMANDERY OF THE UNITED ORDER OF THE GOLDEN CROSS OF THE WORLD, A CORPORATION, APPELLANT,

vs.

RICHARD BERNARD AND ALFRED D. BERNARD, EXECUTORS AND ASSIGNEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

APPELLEES' BRIEF.

I. Q. H. ALWARD,
RICHARD BERNARD & SON,
Attorneys for Appellees.

SUPREME COMMANDERY
UNITED ORDER GOLDEN
CROSS

vs.

RICHARD BERNARD ET AL,
Executors, &c.

IN THE

Court of Appeals

FOR THE

DISTRICT OF COLUMBIA.

OCTOBER TERM, 1905.

No. 1544.

APPELLEES' BRIEF.

STATEMENT OF FACTS.

This is a suit at law on a benefit certificate issued by the appellant to Joseph Trainor, a member of Halcyon Commandery, a local lodge of the appellant, made payable on its face to Catherine W. Trainor his wife, and now claimed by the appellees, as executors of the deceased member, they the said executors being also the assignees of the executor and next of kin of Catherine W. Trainor.

The declaration as amended alleges that the plaintiffs are the executors of Joseph Trainor who died on December 2nd 1902, and as such executors the assignees of the executor and next of kin of Catherine W. Trainor the beneficiary who predeceased her husband; that Joseph Trainor became a member of the appellant in 1890, and the benefit certificate declared on was issued in January of that year.

That the purpose of the appellant among others was to establish a benefit found; that the assessments required and levied were regularly paid up to the assessment levied as of November 1st, 1902, and payable within thity days thereafter, after which time the said Trainor would have been technically disconnected from the order, but with the right to have paid said assessment at any time during the month of December, which assessment, together with an assessment levied on December the first were tendered within thirty days from December the first, and acceptance refused.

That the officers of the defendant had always regarded the clause of the constitution and general laws as giving a member an additional thirty days in which to pay his assessments.

That after Mrs. Trainor's death the insured applied to have the beneficiary changed, which change the appellant refused to make, and being advised that if he failed to name a beneficiary, his wife's personal representatives would receive the fund; he agreed with them that they should turn the fund over to his executors to dispose of according to a letter of instructions he would leave, which agreement and letter are set forth in said declaration together with proof of death, demand, refusal, etc. Appellees also filed with their declaration exhibits A to F, being the wills, certificates and assignments referred to in the declaration, and appearing in the Record, pages 1 to 17.

To the amended declaration the appellant demurred, and the demurrer being overruled exception was noted and six pleas interposed, to which issue was joined. (Record, pages 17 to 22.)

At the trial of the case the appellees, after offering in evidence the exhibits filed with the declaration, the policy of insurance, (Record, page 24,) the letter of instructions to his executors, (Record, page 27,) the Charter, Constitution and General Laws of the appellant, (Record, page 28,) and the application for change of beneficiary, (Record, page 31,)

proved that Joseph Trainor was a member of Halcyon Commandery; had received the degree of the Golden Star and was at one time an officer of the Local Commandery. (Record, page 35.)

It was also in evidence that each year there was a card sent to each member of the Local Commandery with twelve assessment blanks; that there was an assessment levied every month, due on or before the last day of the month succeeding the assessment, which if not paid before the first meeting of the next succeeding month the member was reported disconnected. (Record, pages 28-31-32.)

That the member had a right to pay the assessment at any time during the month following the month in which it became due, and when paid the Secretary would report the member reinstated. (Record, pages 31-36.)

That the assessment due November 1st, 1902, was payable on or before midnight of the 30th, and that an assessment was levied against Joseph Trainor on the first of December, payable on or before December 31st, 1902. (Record, pages 28-36.)

That the Keeper of Records never reported any one as disconnected until after the first meeting following the expired month, when he turned in his cash, and if short he balanced it with disconnected members. (Record, pages 28-30-31.)

That a member had a right on paying his assessment at any time during the month following the month in which the levy was made to be reinstated without any application, and without passing any examination, but simply the payment of the assessment would work a re-instatement. (Record, pages 36-37.)

That Joseph Trainor had been a member of the order for over twelve years, and was late in his payments many times. (Record, pages 31-35.)

There was evidence also that about sixty per cent. of the members waited until after the first meeting following the month in which assessments became due, to pay up. (Record, page 28.)

That Mr. Sharpe, the Treasurer of the dues fund, frequently paid for him as a matter of friendship and was reimbursed by Trainor. (Record, pages 32-35.)

That Mr. Trainor died on December 2d following the 30th of November in which the assessment became due; that his death was without warning. That on December 10th, when he was reported disconnected, it was known to the officer who made the report and to the lodge that he was dead. (Record, page 36.)

At this meeting, according to the evidence, Mr. Meston, the financial Keeper of Records, intimated that he would have paid Mr. Trainor's assessment if he had thought he would get it back, but on Mr. Stetson's remark that perhaps Mr. Trainor had gotten careless about his assessments he was reported disconnected. (Record, pages 28-36.)

There was also evidence that the commandery advanced funds to pay up for delinquent members, and that dues had been paid for members after their death. (Record, pages 33-34.)

It was also in evidence that after the decease of his wife Mr. Trainor applied for change of beneficiary, he desiring to name his then contemplated executor, which application was sent to the appellant and change refused. (Record, pages 25 and 26.)

It was then proved that Mr. Trainor was a resident of Maryland and sought advice in Maryland, and was advised not to name a beneficiary, but to secure an agreement from his wife's sister and brother, her sole personal representatives, to turn over the fund received from the benefit certificate, if paid to them, to his executors, to be disposed of according to his instructions, which instructions were exhibited, proved, and the persons named therein identified. (Record, pages 26-27.)

At the trial below the appellant reserved ten exceptions, three of which were to the refusal of the appellant's prayers and the granting of the first prayer of the appellees, and the remaining seven to the admissibility of evidence.

ARGUMENT.

I.

The Exceptions.

The first exception is to the admissibility of the policy or benefit certificate on the ground that it was not the original.

An inspection of the certificate will remove any doubt that it is the original. (Record, page 25.)

The second exception is to the admissibility of the letter written to the appellees by W. S. Stetson, Keeper of Records of the Local Commandery of the appellant, on the ground that there was no evidence to show that the Keeper of Records had authority to bind the appellant.

The letter was offered to show the fact that the application for change of beneficiary had been made and refused, and the question of agency could not be raised. It is, however, well-settled that the officers of the local lodges are the agents of the Supreme Commandery, and any acts incident to their duties as local officers are binding on the Supreme Commandery.

Prudent Patricians vs. Marr, 20 Appeals, D. C. 363.
Lodge vs. Withers, 177 U. S. 260.
Beil vs. The Lodge, 80 App. Div. N. Y. 609.
Gaige vs. The Lodge, 48 Hun., N. Y. 137.
Modern Woodman vs. Coleman, 89 N. W. Rep. 461.

The third exception, in addition to raising the questions presented in the second, raises the question whether the appellee, Alfred D. Bernard, was a competent witness to testify as to statements made by the deceased Keeper of Records of Halcyon Commandery, W. S. Stetson, under *Section 1064, of the District of Columbia Code.* We submit

that the officer of a local lodge of a beneficial insurance corporation is not a party to the suit within the meaning of said section.

As to the fifth and sixth exceptions relative to the tender of the assessments levied on November and December 1st, and the application for re-instatement, we submit there is no rule of law whereby the evidence could be excluded. It is true, that under some of the authorities tender of these assessments was unnecessary.

The fourth, seventh, eighth, ninth and tenth exceptions raise the only real questions involved; first, whether Joseph Trainor designated a beneficiary within the Charter, Constitution and general laws of the appellant; and second, had the insured, by failing to pay the assessment due November 30, 1902, before he died, forfeited his rights under the benefit certificate.

II.

DID JOSEPH TRAINOR HAVE THE RIGHT TO DESIGNATE BENEFICIARIES UNDER THE POLICY IN QUESTION?

This question we submit is fully answered by the case of *Berkley vs. Harper, 3rd Appeals, D. C. 308,* wherein the charter and by-laws of this same defendant were before this Court.

Under its Charter one of the objects of the Order was to establish a benefit fund, from which a sum not to exceed two thousand dollars shall be paid at the death of each member to his or her family, or to be disposed of as he or she may direct.

The Certificate was issued in favor of the Member's Daughter. Just before his death he directed that a new Certificate be issued in favor of his friend Hadaway, who subsequently became his Executor. The new Certificate was never issued. The Daughter and Hadaway both claimed

the fund. The Order interpleaded; pending the appeal Hadaway died. Held that Harper, Hadaway's Executor, was entitled to recover.

The Court, Alvey, Chief Justice, says:

"The principle of construction, as applied to the clauses and conditions in the constitution and by-laws of these beneficial associations, is required to be liberal, in order to effectuate the main purposes of their organizations. Among the principles that distinguish the benefit certificate of membership in these associations from an ordinary policy of insurance issued by an insurance company, is that which secures to the member the right to appoint or direct the payment of the proceeds of the contract to a person other than the one named in the original certificate. This power of revocation and appointment as to the beneficiary, and as allowed by the constitution and laws of most associations of this class, partakes very much of the nature of a testamentary power of disposition; it may be revoked and a new appointment made at any time before the death of the member. It is now settled, in this class of cases, that the beneficiary nominated in the benefit certificate has no vested right or interest in the benefit contemplated by such certificate simply by virtue of being designated therein as the beneficiary; for the member may, at any time before the contract matures, substitute another person or class of persons, as beneficiaries, unless restrained by the constitution and by-laws of the association. Even in the case where the beneficiary named in the certificate dies before the member, the representatives of such beneficiary have no interest in the benefit, though the member dies without making another nomination. Up to the time of his death the member may change his designation of beneficiary, at will, against the consent of the beneficiary, and that, too, though the latter may have advanced the money to pay the premiums or assessments upon the certificates."

The principles laid down in *Berkley vs. Harper* have been elsewhere announced in various well considered cases.

In *Massey vs. Mutual Relief Society, 102 N. Y. 523,* it was held that the fact that beneficiary was not a person contemplated by the order did not defeat a recovery.

In *Beatty's Appeal, 122 Pa. State, 428,* it was held that the member could change the beneficiary at will.

In *Gentry vs. Lodge, 23 Fed. Rep. 718,* the words "*family, or as he or she might direct,* are construed, where it was held that these words enlarge the word family and mean even a creditor.

To the same effect see—

Relief Assn. vs. McAuly, 2 Mackey 70.
Lamont vs. Grand Lodge, 31 Fed. Rep. 177.
Lamont vs. Hotel Mens. Mut. Ben. Asso., 30 Fed. Rep. 817.

In *Supreme Conclave vs. Cappella, 41 Fed. Rep. 1,* there was not a strict compliance with the required methods of changing a beneficiary, but the member did all he could do and his wishes prevailed.

In *Grand Lodge vs. Child (Michigan), 38 N. W. Rep. 1,* Company insisted the endorsement of change must appear on policy, and refused to make change. The insured who had lost his policy made change on a separate paper, held good.

But we submit that for the purpose of this case this question is not material, unless there was a forfeiture of the policy declared upon. *Some one was entitled to recover. If the plaintiffs in one or another of the various capacities under which they sued could not recover, who could?*

III.

Obviously the main question is, DID THE DEATH OF JOSEPH TRAINOR ON THE SECOND OF DECEMBER WITHOUT HAVING PAID THE ASSESSMENT LEVIED ON THE FIRST OF NOVEMBER, WORK A FORFEITURE OF THE POLICY?

Many of the cases bearing on the question of forfeiture are too meagrely reported to be of any value as precedents outside of the Courts which heard them, where the points determined may possibly be ascertained from the records and briefs of counsel; the chief defects being the absence of the by-laws of the orders. Such cases, whatever way decided, cannot be classified.

The language of the by-laws of all the orders relating to suspension for non-payment of assessments and dues is substantially similar, some few require a judicial determination of the fact of suspension. The preliminary requirements necessary for re-instatement, however, are varient.

To the practice of playing "fast and loose," strict rules and lax methods of enforcement is due much of the litigation on the question of forfeiture. To use the language of a western Court:

> "Collecting indefinitely assessments in disregard of forfeiture so long as it suits its interest so to do, and asserting a secret intention to insist upon a forfeiture whenever such a course better accords with its advantages."
>
> Modern Woodmen vs. Lane, 62 Neb. 97.

Or, as stated by the Maryland Court of Appeals, in an effort—

> "to profit by the application of technical rules, and thus prevent the outgoing of money that came into its treasury through a liberal construction of the very terms relied on."

In discussing this practice, the Court says:

> "It behooves a Court of Justice to give a very close scrutiny to by-laws or other rules that might work such results before giving its sanction to them."
>
> Littleton vs. Wells and McComas Council, 98 Md. 464 and 465.

The by-laws of many of the orders require preliminary to re-instatement, a formal application and a certificate from a medical examiner of good health. The rules further provide that the officers of the local camp are powerless to waive any provision of the by-laws relating to benefits.

That the waiver by subordinate lodges of these conditions imposed by the by-laws should give rise to some conflicting decisions is not surprising.

But notwithstanding the conflict of authorities, no principle is better settled than that announced in *Knickerbocker Ins. Co. vs. Norton, 96 U. S. 234,* "that forfeitures are not favored in law, that they are often the means of great oppression and injustice."

The question as applied to insurance companies and beneficial societies, has been so exhaustively examined by the Supreme Court of the United States, that it is like "bringing coals to Newcastle," to quote at length from cases decided elsewhere.

In the case last cited the Court through Mr. Justice Bradley says :

> "The written agreement of the parties, as embodied in the policy and the indorsement thereon, as well as in the notes and the receipt given therefor, was undoubtedly to the express purport that a failure to pay the notes at maturity would incur a forfeiture of the policy. It also contained an express declaration that the agents of the Company were not authorized to make, alter, or abrogate contracts or waive forfeitures. And these terms, had the Company so chosen, it could have insisted on. But a party always has the option to waive a condition or stipulation made in his own favor. The Company was not bound to insist upon a forfeiture, though incurred, but might waive it. It was not bound to act upon the declaration that its agents had no power to make agreements or waive forfeitures ; but

might, at any time, at its option, give them such power. The declaration was only tantamount to a notice to the assured, which the Company could waive and disregard at pleasure. In either case, both with regard to the forfeiture and to the powers of its agent, a waiver of the stipulation or notice would not be repugnant to the written agreement, because it would only be the exercise of an option which the agreement left in it. And whether if did exercise such option or not *was a fact provable by parol evidence, as well as by writing*, for the obvious reason that it could be done without writing."

In Phoenix Mut. Ins. Co. vs. Doster, 106 U. S. 30, the Court (by Mr. Justice Harlan) said, in speaking of the instruction of the Lower Court which was approved:

"It said, in substance, that if the conduct of the Company in its dealings with the insured and others similarly situated had been such as to induce a belief on his part that so much of the contract as provides for a forfeiture, if the premium be not paid at the day, would not be enforced if payment were made within a reasonable period thereafter, the Company ought not, in common justice, to be permitted to allege such forfeiture against one who acted upon that belief, and subsequently made or tendered the payment."

And again, quoting from a former opinion of the Supreme Court:

"Any agreement, declaration or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract."

The case of *The Insurance Company vs. Norton, supra,* is approved, the Court saying:

> "We are of opinion that these propositions are substantially correct. Nor do we perceive that the rulings of the Court below are in conflict with our decision in *Thompson vs. Ins. Co., 104 U. S. 258.* In that case it appeared that the insured, for a part of an annual premium, had given a note containing the special provision that in the event of non-payment of the note at maturity, the policy should be void. The note was not paid at maturity, nor was payment ever tendered while the insured was alive nor at any time after his death, by or in behalf of the payees in the policy."

In Hartford Life & Annuity Co. vs. Unsell, 144 U. S. 439, the conditions of acceptance were:

> "The holder of this certificate further agrees and accepts the same upon the express condition that if either the monthly dues, assessment or the payment of the ten dollars toward the safety fund, as hereinbefore required, are not paid to said company on the day due, then this certificate shall be null and void and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid for protection while the certificate was in force, either from said company or the trustee of the safety fund."

The holder of the certificate did not pay as stipulated, nevertheless the plaintiff says:

> "That defendant is and ought of right to be estopped from now setting up the alleged failure to pay said dues in advance as any defence, for she avers that during the whole time said Unsell has been the owner of certificates in the defendant company, said defendant has without objection received from him the monthly dues long after the date on which by the terms of the contract they were payable, and had thereby led said

Unsell to believe that the payment in advance was not essential and had waived the payment thereof in advance."

It was in evidence that on January 21st, 1886, the company mailed to Unsell this postal card:

"Hartford Life & Annuity Company. Re-instatement account. Elias J. Unsell, 308 N. Commercial St., St. Louis, Mo. Certificates Nos. 24981, 24986 and 52143 payments are in arrears for assessments; dues from January to May, $5.00."

Memorandum—"This should be returned with remittance, also accompanying health certificate signed by the member. Reinstatement cannot be made without proper warrant that the member is alive and in good health."

When this postal card was written the physical condition of Unsell was such that his furnishing a health certificate was impossible. He died on January 31st, before the dues which his wife remitted reached their destination.

The company after becoming apprised of his death returned the dues, giving as reasons therefor that his membership having lapsed on January 1st and the dues having been unaccompanied with the health certificate re-instatement was impossible.

Mr. Justice Harlan speaking for the Court said:

"Nobody is bound to enter into any contract. It is perfectly voluntary on the part of either side; but when they once enter in, the terms of the contract, as expressed in the writing, control. The plaintiff comes in, however, and says: 'Conceding that this contract reads in this way, the company by its conduct waived the necessity of a strict compliance. She does not say the company so said to her, or to her husband, we do not insist upon this; we waive this; but she

says that the company so acted, so conducted itself in its dealings with her husband that he, as a prudent reasonable man, did believe, and had the right to believe, that payment on the very day specified would not be insisted upon. Of course, we speak by our action just as much as we do by our words; and although there may be no spoken word, no written word, declaring a waiver, yet it may be that a man by his conduct, his course of dealing, justly and fairly leads the other party to believe that he does not care about a strict compliance. That is what this plaintiff says was the case here; that while the contract reads payment must be, made on specified days, yet the company did not insist on such payment. *It did, when her husband was alive and well take the dues from him after the time specified and permit the policy to continue in force*, and that it did so until he had a right, as a reasonable man, to believe, and did in fact believe, that that was to be the rule in the future."

Under the instructions of the lower Court the facts thus put in issue were submitted to the Jury who rendered a verdict for the plaintiff, and the judgment on that verdict was affirmed.

To the same effect is—

Lodge vs. Hammerl, 94 Ill. App. 164.
Murray vs. Home Benefit Asso., 90 Cal. 402.
Moore vs. The Lodge, 90 Iowa, 721.
Bacon on Benefit Societies, section 433.

If there is ambiguity or conflict in the different sections of the laws of the order that construction must prevail which is most favorable to the assured and will tend to defeat a forfeiture.

Connelly vs. Shamrock Ben. Society, 43 Mo. App. 283.

The waiver *vel non* of the forfeiture is a question of fact to be determined by the Jury.

Hartford Life Annuity Co. vs. Unsell, *supra.*
Safety Fund vs. Windover, 137 Ill. 417.

The cases cited all go further than the necessities of our case require.

In the case at bar there is a liberal provision in the general laws for re-instatement, coupled with liberal methods of enforcement. For example: the general law now before the Court reads (Law 12, section 3, Record, page 29):

> "Persons who have been members of the order, but are disconnected for the non-payment of dues or assessments, desiring again to obtain membership, can do so within thirty days after their disconnection, on payment of the arrears for which they were disconnected, and such a fine as the Commandery may by by-laws provide. It shall be the duty of the Financial Keeper of Records to report such re-instatements and dates of the same to the Commandery at its next regular meeting. *If more than thirty days and less than ninety days have elapsed since their disconnection, they must apply to the Commandery of which they have been members, and must comply with the following conditions:* The payment in full of all dues, assessments and fines charged against them and unpaid at the date of their disconnection, and all dues that would have been charged against them during the period of their disconnection, had they remained members of the order. They shall also furnish the Commandery with a certificate from a Medical Examiner of the Order, approved by the Supreme Medical Director, as to their physical condition and fitness. They must also pay into the Benefit Fund assessments according to the rates established for the age which they have attained at the time of restoration."

Thus it will be seen that if more than thirty days is allowed to elapse after disconnection, it is then, but not until then, that trouble comes.

During those thirty days after disconnection, Trainor was a member for the purpose of responding to assessments. "*If he were a member to respond to assessments, why was he not a member to share in benefits?*"

Mutual Aid Society vs. Schwartz, 54 Ill. App. 453.

Or to quote the language of Justice Parker:

"*Dennis' legal right to re-instatement did not die with him, but passed to the beneficiary under the policy.*"

And quoting from *Wheeler vs. The Ins. Co., 82 N. Y.:*

"*Although the insured was dead, the right to a paid-up policy or its value remained to his assignees. If the insured had lived he was entitled to it, and his assignee succeeded to his rights.*"

Dennis vs. Benefit Association, 120 N. Y. 505.

Extension of time of payment inured to the representatives of the member as well as to him.

Supreme Lodge vs. Kalenski, 163 U. S. 295.
Kansas Protective Union vs. Whilt, 36 Kan. 760.
Grand Lodge vs. Lachman, 101 Ill. App. 213.
Modern Woodmen vs. Coleman, 89 N. W. Rep. 641.

So, in this case, if the laws and customs of the Order gave Trainor the right to pay during the month of December the assessment levied on November first, his death did not defeat that right.

The proof is clear that notwithstanding Trainor's disconnection on November 30th for the non-payment of the assessment levied on November 1st, there was another assessment levied against him December the first, payable within 30 days thereafter. (Record, page 36.)

The levying of an assessment after disconnection is a a waiver of the forfeiture, provided such subsequent assessment is paid or tendered.

"If the time of payment was extended, as it constructively was by the new assessment, the death of the member did not defeat it if payment was afterwards made or tendered."

McGowan vs. Legion, 98 Iowa, 118.

That the assessment of December the first was levied, and was also payable at the date of Joseph Trainor's death, further appears from the second prayer of the plaintiffs, upon the measure of damages, which was conceded and not excepted to, the amount of the assessments of November the first and December the first being deducted from the face of the policy. (Record, pages 37 and 38.)

There are orders in which the conditions of suspension are clear and strict and the terms of re-instatement rigid, with equally strict and rigid adherence to such rules in business methods.

It appears from the case of *Yoe vs. The Howard Mut. Ben. Asso., 63 Md. 86*, that such was the character of that Association. There the rules of the order provided that "each member shall within thirty days from date of notice pay the sum of one dollar and ten cents, and in case he neglects or refuses to pay the same his name shall be erased from the roll of members, and he shall forfeit all claims upon the association; nevertheless, any member may be reinstated by giving such excuse himself or through his representative for failing to pay his assessments *as may be satisfactory to the Board of Directors.*" (Page 90.)

Yoe died two days after the expiration of the thirty days from the date of notice, and no payment or tender was ever made of the delinquent assessment. (Page 91.)

In this respect the case resembles *Thompson vs. Ins. Co., 104 U. S. 259,* also relied upon by the appellant here.

Continuing, the Court, Alvey, C. J., says at page 92 :

> "If the obligations of members were not insisted on with strictness the whole object of the Association would be liable at any time to be frustrated, for *if one member could be indulged beyond the limits prescribed by the articles of Association, each and every one of them could claim a similar indulgence.*" PRECISELY SO.

The Court says, on page 93 :

> "There is nothing in the case that can be fairly construed to operate as a waiver on the part of the Association of its right to insist upon a forfeiture under the articles referred to."

To this class of cases belong the case of *Drum vs. Benton, 13 App. D. C. 245,* and *Crossman vs. The Association, 143 Mass. 435,* where a new contract was necessary upon reinstatement.

Indeed, an examination of all the cases relied upon by the appellant, where the by-laws sufficiently appear, will disclose the facts that the requirements that here prevail after thirty days from the date of disconnection, there prevailed from its date, the immediate effect of which is that the member preliminary to re-instatement must make a formal application and be in good health when the application is made. To defeat forfeiture under such by-laws the delinquent's representatives must undertake to show that by usage or the methods of doing business forfeiture was waived.

Here there was nothing to be done under the terms of the general law heretofore quoted at length but the payment of the assessment at any time within the thirty days from the date of disconnection. If paid within that time, the law did not require the member to be in good health as a condition of re-instatement.

Mr. Sharpe testified "That Mr. Trainor never made a formal application for re-instatement and never passed a medical examination that he was re-instated by payment; that the commandery seldom likes to have any disconnections and to avoid them some member would pay the assessment, and when the member paid up his dues, he would be reimbursed." (Record, page 31.)

Mr. Meston testified "That if Mr. Trainor had been alive he would have taken the assessment at any time during December; that he had been disconnected on quite a number of occasions and never made a formal written application for re-instatement; *that he simply paid his dues and was re-instated as a matter of course.* That an assessment was levied December 1st, and payable any time during December, which assessment was tendered. (Record, page 36.)

There is nothing in the evidence to show that the local lodge in any manner strained or went outside of the general laws in its methods of re-instatement, within thirty days from date of disconnection, so that, as a matter of fact the plaintiffs assumed greater burdens and the Court really gave the appellant more law than it was entitled to.

We respectfully submit that it is contrary to every principle of Justice and no case can be found where under the laws of the Order a member had an unqualified right to pay up his assessments and be re-instated, without formal application, independent of any vote of the Order or its officers, and where the uniform custom was to accept assessments and re-instate members as a matter of course without formal application, where the right to share in benefits was denied to the representatives of a deceased member dying within the time allowed for re-instatement, where such representatives paid or tendered the assessments within that time, and therefore, the judgment should be affirmed.

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